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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

OKLAHOMA NATURAL GAS COMPANY,
Petitioner,

v.

WILLIAMS NATURAL GAS COMPANY,
SMITH COGENERATION INC.,
POWERSMITH COGENERATION PROJECT
LIMITED PARTNERSHIP, and
CITY OF OKLAHOMA CITY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Does Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), divest the state courts of jurisdiction to decide whether the holder of a valid FERC certificate must also comply with state law, and instead commit to FERC and the federal courts of appeal exclusive jurisdiction to adjudicate whether the FERC certificate is preemptive?

2. After a state court determines that it has jurisdiction over issues before it, and renders judgment on those issues, may a lower federal court enjoin enforcement of that judgment on the ground that the state court erroneously resolved the jurisdictional question?

PARTIES TO THE PROCEEDINGS

In the court below, Williams Natural Gas Company was the appellant; Smith Cogeneration, Inc. and Power-Smith Cogeneration Project Limited Partnership were intervenors-appellants; and Oklahoma Natural Gas Company and the City of Oklahoma City were appellees. The City of Oklahoma City did not participate in the proceedings in the court of appeals. As required by Rule 29.1 of the Rules of this Court, Oklahoma Natural Gas Company states that it is a division of ONEOK Inc. and that ONEOK Inc. has no parent company and no subsidiaries, except wholly owned subsidiaries.

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LIMITED PARTNERSHIP, and
CITY OF OKLAHOMA CITY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Oklahoma Natural Gas Company petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 890 F.2d 255. The orders of the Oklahoma state court (App., *infra*, 22a-30a), enforcement of which the court of appeals concluded should be enjoined, are not reported. The pertinent orders of the United States District Court for the Western District of Oklahoma (App., *infra*, 31a-44a) are not reported. The order of the Federal Energy Regulatory Commission issuing the certificate of public convenience and necessity (App., *infra*, 45a-61a) and the order denying rehearing

(App., *infra*, 62a-74a) are reported at 46 FERC (CCH) ¶ 61,160 and 47 FERC (CCH) ¶ 61,308.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 1989. App., *infra*, 1a. A timely filed petition for rehearing was denied on December 27, 1989. App., *infra*, 75a-76a. *See also* App., *infra*, 77a-78a (nunc pro tunc corrective order issued January 5, 1990). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Natural Gas Act of 1938, as amended, 15 U.S.C. §§ 717-717z, are reprinted in Appendix H to this petition. App., *infra*, 100a-107a. The provisions of 28 U.S.C. § 1738 and 28 U.S.C. § 2283, as well as the Oklahoma Declaratory Judgment Act and the Oklahoma Constitution's provisions regarding local franchises, are reprinted in Appendix I. App., *infra*, 108a-110a.

STATEMENT OF THE CASE

This case involves questions about the lower federal courts' power to interfere with state courts' adjudication of certain cases involving state-law claims and preemption defenses.

Petitioner Oklahoma Natural Gas Company brought suit in state court alleging that respondent Willliams Natural Gas Company could not construct and operate a proposed pipeline in Oklahoma City, Oklahoma, without complying with a state-law requirement. Williams subsequently applied for and received a certificate of public convenience and necessity for the pipeline from the Federl Energy Regulatory Commission (FERC) under the Natural Gas Act (NGA), 15 U.S.C. § 717f. The state court accepted Oklahoma Natural's state-law claim. When Williams asked a federal district court to bypass the

state-court proceeding and to rule that the state-law requirement was preempted, the district court ultimately declined to do so, because Williams had presented the preemption issue as a defense in the state-court action, and the state court had by that time found that it had jurisdiction and rejected the defense. The district court refused to enjoin the state-court order.

The court of appeals reversed. It held that the Natural Gas Act divested the state court of jurisdiction to adjudicate petitioner's case and instead granted FERC (and a federal appeals court reviewing FERC's decision) exclusive jurisdiction to decide the preemptive effect of FERC certificates. The court of appeals directed the district court to enjoin enforcement of the state court order requiring Williams to comply with state law.

1. Petitioner is the long-time distributor of natural gas to the citizens of Oklahoma City, Oklahoma. To provide that service, petitioner obtained, and has long held, a franchise from the city to use the public streets for that purpose. In 1988, Smith Cogeneration, Inc. and PowerSmith Cogeneration Project Limited Partnership (collectively, "PowerSmith"), which were nearing completion of a large facility in Oklahoma City, contracted with Williams to transport natural gas directly to the new facility, thus bypassing petitioner's local distribution facilities. Construction, maintenance, and operation of the pipeline that was needed to reach PowerSmith required that Williams use the public streets of Oklahoma City. The several cases pertinent to this petition involve Williams' efforts to construct and to operate that pipeline without obtaining the necessary franchise from Oklahoma City.[1]

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[1] Under Oklahoma law, franchises are not exclusive. Okla. Const., art. 18, § 7. App., *infra*, 110a. The voters of a city may approve "as many competing franchises as they deem[] necessary." *Oklahoma Gas and Electric Co. v. Total Energy, Inc.*, 499 P.2d 917, 924 (Okla. 1972). A company must obtain a franchise to use local

When it became clear that Williams did not intend to apply for a city franchise, petitioner filed suit in Oklahoma state court under the Oklahoma Declaratory Judgment Act, 12 Okla. Stat. 1981, § 1651. *See* App., *infra*, 81a-86a (petition filed October 18, 1988). Petitioner asked the court to rule that Williams could not use local streets to serve PowerSmith in Oklahoma City unless it first obtained a franchise. At that time, petitioner could not be certain that Williams would seek a FERC certificate for the pipeline,[2] but petitioner's claim that Williams must obtain a franchise in no way depended on whether Williams also obtained a valid FERC certificate. App., *infra*, 81a-86a.

Shortly thereafter, on October 28, 1988, Williams applied to FERC for a certificate of public convenience and necessity, pursuant to Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), to construct and to operate a twelve-mile pipeline to serve PowerSmith. In that proceeding, petitioner urged FERC not to issue the certificate for two main reasons. First, petitioner argued that

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streets to serve a local customer if another company is already serving the same community under a franchise. *Id.*

[2] A company like Williams that is "an interstate pipeline company" within the NGA jurisdiction of FERC may engage in activities that are outside FERC's jurisdiction. *Associated Natural Gas Co.*, 43 FERC (CCH) ¶ 61,304, at 61,836 (1988). In addition, Section 1(c) of the NGA specifically provides that, to the extent that an interstate pipeline company receives gas within or at the boundary of a state for ultimate consumption within that state, it may be exempted from FERC jurisdiction without any action or declaration by the agency. 15 U.S.C. § 717(c); *American Distribution Co.*, 28 FERC (CCH) ¶ 61,323, at 61,596 n.4 (1984). Because Oklahoma is a major gas-producing state, the proposed natural gas service to PowerSmith could well have been set up as an intrastate transaction. In fact, Williams, PowerSmith, and the sellers of the gas agreed to pursue an intrastate arrangement in the event that FERC denied the requested interstate certificate. *Williams Natural Gas Co.*, 46 FERC (CCH) ¶ 61,160, at 61,558 n.11 (1989); App., *infra*, 51a.

the pipeline was outside FERC's regulatory jurisdiction under Section 1 of the NGA, 15 U.S.C. § 717, because it was essentially local distribution rather than interstate transportation. Second, petitioner argued that, even if the pipeline were within FERC's Section 1 jurisdiction, its construction and operation did not meet the Section 7(c) standard of public convenience and necessity. *See* App., *infra*, 4a; Motion to Intervene, Protest and Motion to Dismiss of Oklahoma Natural, pp. 3-8 (Nov. 29, 1989).

Meanwhile, on November 10, 1988, Williams filed an answer in the state-court action. As subsequently elaborated in an amended answer and a motion for summary judgment (filed after FERC issued the certificate), Williams' defenses included three principal arguments: first, that the franchise requirement did not apply as a matter of state law; second, that the requirement was preempted by the NGA; and third, that the state court lacked jurisdiction over the case because the suit was essentially a collateral attack on the FERC certificate. *See* App., *infra*, 87a-92a; Williams' Motion for Summary Judgment and Brief in Support Thereof, pp. 16-19 (May 12, 1989).[3]

2. On February 16, 1989, the state court issued the first of its two orders that are relevant here. In that order, the court held that state law required Williams to obtain a franchise as a prerequisite to using the streets of Oklahoma City to transport gas to PowerSmith within the city limits. App., *infra*, 22a-25a. The state court specifically reserved for later consideration whether the state-law requirement was preempted by federal law. *Id.* at 24a.

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[3] In its amended answer, Williams acknowledged that its pipeline would be subject to some state laws even if it obtained the FERC certificate. App., *infra*, 89a (stating that its pipeline would be "subject only to compliance with environmental, safety and similar requirements of local concern").

On the same day, FERC awarded Williams its Section 7(c) certificate. App., *infra*, 45a-61a. The Commission decided the Section 1 jurisdictional issue against Oklahoma Natural, holding that the proposed facility involved transportation of natural gas in interstate commerce and that it was not a facility used for the "local distribution" of natural gas. App., *infra*, 52a-55a. Without a hearing, the Commission also rejected petitioner's several arguments that Williams' proposed pipeline did not meet the statutory standard of public convenience and necessity. *Id.* at 55a-61a.

3. On March 28, 1989, six weeks after the adverse decision on the franchise issue in state court, Williams filed the present action in federal district court against the City of Oklahoma City, seeking to condemn the property necessary for the proposed pipeline pursuant to Section 7(h) of the NGA, 15 U.S.C. § 717f(h). App., *infra*, 93a-99a. In the same suit, Williams included an ancillary cause of action against Oklahoma Natural, seeking to quiet title to the condemned property with respect to Oklahoma Natural's assertion of countervailing franchise rights. *Id.* at 97a-99a. Williams' claim against Oklahoma Natural in federal court thus raised (1) the franchise issue that had already been decided against Williams in state court and (2) the federal preemption defense then being litigated in the state-court suit.

On April 18, before Oklahoma Natural had filed its answer, the federal district court approved an interlocutory order granting Williams immediate possession of the easements sought to be condemned. App., *infra*, 33a-34a. With the agreement of Williams, that order was limited to possession for the purpose of construction—but not operation—of the pipeline. The question of preemption of Oklahoma Natural's franchise rights was reserved for later decision. *Id.* at 31a-32a.

On April 28, the state court temporarily restrained Williams from constructing the pipeline. That order was

promptly enjoined by the federal district court. App., *infra*, 36a-37a (order of May 1, 1989). The federal court's ruling permitted Williams to continue the construction of the pipeline, as previously authorized on April 18. The court made clear, however, that it would not interfere with the state court's consideration of the issue of federal preemption of the state franchise requirement: "The issue of pre-emption having been first presented to the State court, this Court will not proceed to decide that issue in advance of the state court decision on the issue if that be made within a reasonable time." *Id.* at 37a.

On May 19, the state court entered its final order—a declaratory judgment in favor of Oklahoma Natural. App., *infra*, 26a-30a. Notwithstanding Williams' argument that the state-court action was barred as a collateral attack on the FERC certificate, which could be reviewed only in a federal court of appeals under Section 19(b) of the NGA, 15 U.S.C. § 717r(b), the state court concluded that it had jurisdiction to decide the issues, relying on this Court's decision in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988). App., *infra*, 28a & n.4. The court also accepted petitioner's argument that, even if Williams' pipeline was within FERC's jurisdiction under NGA Section 1, the Oklahoma franchise requirement applied, because the NGA did not oust states of authority to regulate matters of local concern, such as the use of public streets. App., *infra*, 28a-30a; *id.* at 29a n.7 (citing report entitled "Regulation of Gas Utility Bypass: A Case for Concurrent Jurisdiction"). In aid of its judgment, the state court enjoined Williams from operating its now-completed pipeline unless it first obtained the required local franchise from the city and its voters. App., *infra*, 30a.

Williams challenged the state court ruling in two ways. In July 1989, it filed an appeal in the Oklahoma Supreme Court (which is still pending). *Smith Cogener-*

ation, Inc. v. Oklahoma Natural Gas Co., No. 73,649 (Okla., filed July 18, 1989). Even before it filed its state-court appeal, however, Williams returned to the federal court, asking for an injunction against enforcement of the state court order. On May 30, the federal district court denied Williams' motion. App., *infra*, 39a-44a. The court declined to decide the preemption question, holding that, under the doctrine of *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), it was barred from "acting as an appellate court for purpose of overriding a state court judgment." App., *infra*, 41a.[4] The court certified the question for immediate appeal under 28 U.S.C. § 1292(b). App., *infra*, 44a.

The next day, FERC denied Oklahoma Natural's request for rehearing. App., *infra*, 62a-74a. In a footnote, the Commission noted and expressed disagreement with the state court ruling on the preemption question, although FERC did not suggest that the issue was before it for consideration. *Id.* at 65a n.5. In fact, the Commission specifically recognized that the issues previously pending in the state court were quite separate from those presented in the FERC proceeding:

> As previously indicated, a determination by the state court as to whether or not [Williams] requires authorization under the franchise law to install the pipeline in Oklahoma City *has no bearing on our determination* of whether the [pipeline] is in the public convenience and necessity. Should the state court determine that [Williams] needs authorization under the franchise law, the issue *will be* whether or not that determination is preempted by our certificate authorization.

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[4] The court also cited *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), in which this Court held that the Anti-Injunction Act, 28 U.S.C. § 2283, barred a federal district court injunction against enforcement of a state court order in a case presenting a preemption defense.

App., *infra*, 72a (emphasis added). Oklahoma Natural filed a petition to review FERC's decision issuing the certificate of public convenience and necessity in the Court of Appeals for the District of Columbia Circuit, pursuant to Section 19(b) of the NGA, 15 U.S.C. § 717 (b). *Oklahoma Natural Gas Company v. FERC*, Case No. 89-1376 (D.C. Cir., filed June 12, 1989).[5]

4. The Court of Appeals for the Tenth Circuit reversed the district court's refusal to enjoin enforcement of the state court order, concluding that "the state court lacked jurisdiction to entertain a collateral challenge to the FERC certificate." App., *infra*, 3a. Despite contrary urgings by Williams, the court expressly declined to reach the substantive preemption question whether FERC's regulatory authority over Williams' pipeline excludes application of the state franchise law. *Id.* at 8a-9a. Instead, the court ruled that the state court was deprived of jurisdiction by Section 19(b) of the NGA, which grants the federal courts of appeals, on a petition for review of FERC orders, exclusive jurisdiction to review a FERC certificate. App., *infra*, 9a-18a.[6]

Although petitioner's claim in state court was that Williams was required to obtain a local franchise *in addition to* any FERC certificate it might receive, the court of appeals treated petitioner's claim in state court as if it sought to "affirm, modify, or set aside" the FERC certificate. Thus, the court viewed the state-court case as presenting essentially the same challenge to FERC's jurisdiction under Section 1 of the NGA that petitioner

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[5] Neither that appeal nor the appeal in the state supreme court has yet been argued.

[6] Concluding that "[j]udicial review under § 19(b) is exclusive in the courts of appeals once the FERC certificate issues," App., *infra*, 12a, the Tenth Circuit viewed both itself and the district court in this condemnation action as lacking jurisdiction to decide the merits of the preemption question, as Williams asked them to do. App., *infra*, 17a, 18a.

presented to FERC. App., *infra*, 14a ("however characterized, the state court's consideration of the preemption issue ultimately challenges FERC's determination of its own jurisdiction"); *id.* at 14a-16a. Extensively relying on this Court's decision in *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), the court of appeals throughout its opinion characterized petitioner's claim in state court as a prohibited "collateral attack" on the "lawfulness" of the certificate. App., *infra*, 11a-13a, 16a-18a; *see* App., *infra*, 14a (quoting D.C. Circuit's ruling in *City of Rochester v. Bond*, 603 F.2d 927, 936 (1979), that "insofar as [a claim] may affect the lawfulness of a directly appealable order," the claim must be raised on direct appeal of the agency order). Saying that petitioner "could have and should have raised the preemption issue before FERC," App., *infra*, 17a, the court of appeals, without further analysis, concluded that the state court ruling must therefore be enjoined. *Ibid.* ("Thus, the federal district court erred in refusing to enjoin the enforcement of the state court injunction.")

Finally, the court rejected the argument that the *Rooker* doctrine prohibited the district court from reviewing the state court's ruling. App., *infra*, 18a-21a.[7] The court stated: "Just as the federal courts lack jurisdiction to review the decisions of the state courts, so also must state courts defer to the federal appellate process mandated by Congress. What is sauce for the goose is also sauce for the gander." App., *infra*, 19a (footnote omitted). In the court's view, because the state court considered the preemption question "only after the FERC certificate issued and after the exclusive judicial review provisions of § 19 attached," "the deference afforded the

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[7] The court of appeals did not separately discuss whether requiring the district court to enjoin enforcement of the state-court order was consistent with the Full Faith and Credit Act, 28 U.S.C. § 1738, with the Anti-Injunction Act, 28 U.S.C. § 2283, or with the absention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971).

decisions of state courts under *Rooker* [was] not warranted" here. App., *infra*, 20a, 21a.[8]

REASONS FOR GRANTING THE WRIT

The decision below in this case places a new, and wholly unjustified, limit on the power of state courts to decide cases arising under state law. The Tenth Circuit has determined that the Natural Gas Act bars a state court from deciding whether a company, having been awarded a certificate of convenience and necessity by FERC, must also comply with state law before operating a pipeline. According to the court of appeals, the issues of state law—as well as the issue of whether state law has been preempted—can be raised only before FERC and, subsequently, before a federal court of appeals reviewing the FERC decision. As a result, to prevent a "collateral attack" on the order granting the certificate, the court directed that the state court's judgment and accompanying injunction be enjoined.

This cutback in the authority of state courts finds no basis whatsoever in the Natural Gas Act. The issue before the Oklahoma courts in this case is *not* whether respondent had obtained a valid certificate from FERC but whether—assuming that it had—it was also required to comply with franchising requirements under state law. Nothing in the Natural Gas Act commands that a party appearing before FERC not only oppose issuance of a certificate but also, to the exclusion of other tribunals, raise questions about the effect of the certificate (if issued) upon any requirements of state law. Whether state law applies, and whether it is preempted, are matters distinct from, and independent of, the validity of the

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[8] On December 27, 1989, the court of appeals denied rehearing. App., *infra*, 75a-76a. On January 12, 1990, the court of appeals stayed issuance of its mandate pending review by this Court if a petition for a writ of certiorari is filed on or before February 12, 1990. App., *infra*, 79a-80a.

certificate. For that reason, such issues can be, and often have been, raised and decided in proceedings other than those regarding the issuance of the certificate itself. *See, e.g., Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988).

The Tenth Circuit, by its broad holding, has worked an unwarranted expansion of FERC authority at the expense of state courts. Moreover, by its order to enjoin the state proceedings, it has disregarded a variety of related doctrines restricting interference with actions in state court. *See* 28 U.S.C. §§ 1738, 2283; *Younger v. Harris*, 401 U.S. 37 (1971); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). Here, the state court expressly determined that it had jurisdiction over petitioner's state-law claim. While the court of appeals may have disagreed with that conclusion, that disagreement does not justify its decision to interfere; rather, state proceedings "should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988) (internal quotes omitted). The refusal of the court of appeals to adhere to that standard—a refusal based on a serious misreading of the Natural Gas Act—is important and warrants review by this Court.

I. SECTION 19(b) OF THE NATURAL GAS ACT DOES NOT COMMIT TO FERC AND THE FEDERAL COURTS OF APPEALS, TO THE EXCLUSION OF STATE COURTS, A CLAIM THAT A HOLDER OF A VALID FERC CERTIFICATE MUST COMPLY WITH STATE LAW.

The decision of the court of appeals rested on one, and only one, ground: that Section 19(b) of the Natural Gas Act stripped the state court of jurisdiction to adjudicate petitioner's case. Absent that limitation, it is beyond serious question that under all of the ordinary jurisdic-

tional rules, the state court was entitled to hear that case. Petitioner's claim raised a question of state law, which the state court was uniquely competent to decide. Although respondent Williams' defense of preemption raised a question of federal law, this Court has long made clear that, absent a clear congressional statement to the contrary, the state courts are fully competent and presumptively entitled to decide such questions, with federal court review of the federal law rulings available only in this Court after exhaustion of state court appeals.[9] But the court of appeals read Section 19(b) to effect a sharp break with that normal pattern, concluding that the provision embodied a clear congressional mandate to divest the state court of jurisdiction and instead to commit the issues—or at least the defense of preemption—exclusively to FERC and to the federal court of appeals reviewing FERC's decision.[10] That ruling is incorrect and unprecedented; Section 19(b) does not work so extraordinary a divestiture of state court jurisdiction.

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[9] *E.g.*, *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149-50 (1988); *Hathorn v. Lovorn*, 457 U.S. 255, 266-67 (1982); *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656, 663 (1961); *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876).

As this Court recently made clear, even if a suit arises under federal law, the state courts would have authority, and be presumed competent, to adjudicate the suit, unless Congress has affirmatively ousted the state courts of jurisdiction over the federal claim. *Tafflin v. Levitt*, 110 S. Ct. 792, 58 U.S.L.W. 4157, 4158 (1990). At least as high a standard of affirmative congressional ouster of state-court jurisdiction must apply where the state-court action is based on state law and the only federal question is a defense.

[10] In requiring that petitioner present its claim to the court of appeals reviewing the FERC certificate decision, the Tenth Circuit required that petitioner first present that claim to FERC, because Section 19(b) limits judicial review to claims that have been presented to FERC. *See* App., *infra*, 17a.

1. The language of Section 19(b) is clear and straightforward. When the Commission has entered an order on an application for a certificate of public convenience and necessity under Section 7(c), Section 19(b) permits the filing in certain federal courts of appeal of a petition for review "praying that the order of the Commission be modified or set aside in whole or in part." The provision then declares that the court of appeals has exclusive jurisdiction "to affirm, modify, or set aside" the Commission's order. The claim that petitioner made in state court, however, simply does not seek that relief. Petitioner's claim is that the state franchise law applies to Williams' pipeline even if Williams receives a valid FERC certificate—that is, even if FERC has jurisdiction over the proposed pipeline and even if FERC properly determines that the pipeline meets Section 7(c)'s "public convenience and necessity" standard.[11] Petitioner's claim does not seek to "modify" or "set aside" the FERC certificate, but assumes the certificate's validity and urges that Williams must comply with an *additional* requirement. Right or wrong, preempted or not, petitioner's state-law claim therefore is not covered by Section 19(b).[12]

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[11] The Oklahoma franchise law does not require that those companies subject to it be regulated in any respect as public utilities. *Oklahoma Gas and Electric Co. v. Total Energy, Inc.*, 499 P.2d 917 (Okla. 1972). The franchise is simply authority for a company to use local streets to serve local customers regardless of whether the company is regulated as a utility. 499 P.2d at 919-20. Unless public streets "are used, a franchise is not necessary." 499 P.2d at 921. Accordingly, by seeking under its state claim to apply the Oklahoma franchise requirement to Williams, petitioner does not seek to challenge FERC's jurisdiction over Williams as a regulated interstate pipeline.

[12] The court of appeals suggested at one point that its conclusion turned on the fact that "FERC issued its certificate order before the state court entertained the issue of federal jurisdiction or preemption." App. *infra*, 9a. That fortuity of timing is wholly irrelevant to the proper application of Section 19(b). The timing of

The court of appeals reached an incorrect result because it mistakenly treated petitioner's claim in state court as the same, for purposes of Section 19(b), as the claims petitioner made in the FERC proceeding.[13] Before FERC, petitioner argued that the pipeline was not within FERC's jurisdiction under Section 1 of the NGA, 15 U.S.C. § 717, and that, in any event, the requested certificate should not issue because the project was not in the public convenience and necessity, as required by NGA Section 7(c), 15 U.S.C. § 717f(c). There is no doubt, and it is undisputed, that those claims are challenges to the issuance of the certificate itself and must therefore be presented to FERC and to the reviewing court under Section 19(b). But it is a very different matter to al-

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FERC's order does not alter the character of petitioner's state-law claim, which, regardless of when FERC issues its certificate, is not an attempt to modify or set aside the FERC order. And it makes no sense to make the obligation to raise an issue in a Section 7(c) certificate proceeding turn on the eventual timing of FERC's ruling in that proceeding. Nor does it make sense to construe Section 19(b) so as to encourage FERC and state courts to engage in a race to decision.

[13] Thus, the entire analysis of the court of appeals rests on its treatment of petitioner's state-court claim as if it were a challenge to the validity of the FERC certificate. The court characterized petitioner's state-court claim as a "collateral attack" on the validity of the FERC certificate. App., *infra*, 13a; see *id.* at 13a-14a, 17a-18a. The court described the arguments petitioner made to FERC—concerning FERC's jurisdiction under Section 1 of the NGA and the public convenience and necessity under Section 7(c)—as the same as "the preemption argument in everything but name." App., *infra*, 15a. The court said that the state-court claim "ultimately challenges FERC's determination of its own jurisdiction." App., *infra*, 14a. In quoting from *City of Rochester v. Bond*, 603 F.2d 927, 936 (D.C. Cir. 1979), the court viewed petitioner's state-court claim as one that " 'may affect the *lawfulness* of a directly appealable order' " of FERC. App., *infra*, 14a (emphasis added). The court concluded that petitioner's state-court claim raised a "dispute[] arising under the Natural Gas Act" (App., *infra*, 17a) and attacked "the substance and validity of [the] FERC order" (App., *infra*, 18a).

lege, as petitioner did in state court, that Williams must comply with the state franchise law even if it obtained a valid FERC certificate. That claim does, of course, raise a question about the *legal effect* of the FERC certificate—whether the certificate is sufficient to authorize Williams' pipeline notwithstanding Williams' failure to comply with the state franchise law. But, unlike the arguments made to FERC, the claim does not raise any issue bearing on the *validity* or *lawfulness* of the FERC certificate.

This Court noted very much the same distinction in *Central New England Ry. v. Boston & A.R. Co.*, 279 U.S. 415 (1929), where the Court rejected a challenge to state-court jurisdiction under a similar statutory scheme. There, although Congress had provided for exclusive federal review of orders issued by the Interstate Commerce Commission, the Court found that a state-court suit in breach of contract for railroad service was not a suit to "enjoin, set aside, annul or suspend" the ICC order authorizing abandonment of that service. *Id.* at 420-21. The Court stated: "The question is merely one of the legal effect of the order. Neither party contests its validity or asks that the carrier be compelled to do anything inconsistent with its terms." *Id.* at 421. In this case, however, the court of appeals treated a suit regarding "the legal effect" of the FERC certificate as though it did "contest[] its validity." [14] The unfortunate result of

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[14] In equating the validity with the effect of a FERC certificate, as well as in equating the preemption question with the question of FERC jurisdiction, the court of appeals seems implicitly to have decided that a valid FERC certificate automatically has preemptive effect. The court's analysis therefore seems to answer the preempton question on the merits, even though the court expressly held that it would not and could not resolve the preemption question because only the D.C. Circuit in its Section 19(b) review had jurisdiction to do so. *See* App., *infra*, 8a-9a, 18a. In fact, it is plain that obtaining a FERC certificate does not automatically exempt a pipeline from state regulation, but that preemption de-

that error is to deny state court jurisdiction when Congress had no intention to do so.[15]

2. The court of appeals' view that the NGA ousts state courts of jurisdiction over cases like petitioner's—and commits preemption issues exclusively to Section 19(b) review proceedings—is directly contrary to the precedent of this Court. First, it conflicts with this Court's ruling in *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961), a case much like the present. There, a pipeline brought suit in state court to recover alleged overpayments to producers on state-law theories of contract and unjust enrichment. The defendant, in addition to alleging preemption of those claims by NGA regulatory authority over the producers' filed rates, argued that the state court lacked jurisdiction because the suit was in reality one either to enforce a filed rate (hence within exclusive district court jurisdiction under Section 22 of the NGA, 15 U.S.C. § 717u) or to challenge a filed rate (hence within exclusive court of appeals jurisdiction under Section 19, 15 U.S.C. § 717r). The Court rejected the jurisdictional

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pends on the particular state measure at issue. *See Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n*, 341 U.S. 329 (1951); *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n of Indiana*, 332 U.S. 507 (1947). Even Williams conceded this in its amended answer. *See* note 3, *supra*.

[15] To the extent that the court of appeals appears to suggest that the state court lacked jurisdiction, not over petitioner's claim, but only over the preemption defense, that suggestion is insupportable. First, it is inconsistent with the court's own holding that the state court's injunction must be enjoined, for that injunction is, of course, perfectly proper if the defense of preemption is barred. In any event, we know of no precedent for the idea that a state court is entitled to adjudicate only half of a case—to rule on the plaintiff's claim but not the defendant's defense. Nothing in Section 19(b) or in practice or precedent requires FERC, in awarding a certificate, to issue an anticipatory ruling on the preemptive effect of that certificate, or requires that the certificate applicant's argument for preemption be raised by an adverse party.

challenge, observing that the pipeline's claims under state law were not—and the Court was not entitled to recharacterize them to be—efforts either to "enforce [a] liability or duty" under the NGA (Section 22) or to "modify" or "set aside" a filed rate (Section 19). The Court thus concluded that neither Section 19 nor Section 22 of the NGA, nor concerns about uniformity of natural gas regulation, deprived the state court of jurisdiction over the suit, even though a federal NGA preemption defense was at issue. 366 U.S. at 662-66. So it is here: notwithstanding the presence of a preemption defense in the state court action, the state court has jurisdiction over petitioner's case because petitioner's claim, based on state law, is not one to "modify" or "set aside" a FERC certificate within the coverage of Section 19(b).

Second, and perhaps even more significant, the regular practice of this Court and lower federal courts is inconsistent with the Tenth Circuit's view that the preemptive effect of a FERC certificate may be litigated only in Section 19(b) review proceedings. Thus, this Court has repeatedly exercised jurisdiction to decide preemption questions raised by FERC's orders, including awards of Section 7(c) certificates, in cases other than Section 19(b) review proceedings—that is, in cases filed in state court or in federal district court. *See Northwest Central Pipeline Corp. v. Corporation Comm'n of Kansas*, 109 S.Ct. 1262, 1272-73, 1277 n.14 (1989); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. at 298, 302; *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 414-15, 423 n.5 (1986); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 180 (1983); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 574-75 (1981); *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm'n*, 341 U.S. 329, 332 (1951); *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n of Indiana*, 332 U.S. 507, 510 (1947); *see also Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 961-62 (1986). Those decisions necessarily establish the jurisdiction of both this Court and

the lower courts to decide the preemption question outside the Section 19(b) context.[16]

The lower courts, too, have exercised jurisdiction to decide preemption questions outside Section 19(b) review proceedings, and have carefully distinguished the substantive preemption question (*i.e.*, whether application of certain state laws to a FERC-certificated project is preempted) from the question of FERC jurisdiction to issue a certificate. For example, in *Michigan Consolidated Gas Co. v. FERC*, 883 F.2d 117 (D.C. Cir. 1989), the D.C. Circuit considered a Section 19(b) appeal from a FERC certificate proceeding under Section 7(c) of the NGA. After finding that FERC had jurisdiction to issue a certificate, the court specifically distinguished the preemption question: "To what extent this works a preemption of state regulation is not the subject of the present petition for review, and we need not discuss it." 883 F.2d at 122. This preemption question then was considered in a separate action in federal district court (consolidated with a case initially filed in state court). The Sixth Circuit in that action ruled on the merits of the preemption question without ever suggesting that it or the district court (or state court) lacked jurisdiction because the preemption issue should have been raised before FERC. *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295 (6th Cir. 1989).

It appears, in fact, that even FERC itself does not share the Tenth Circuit's view of the scope of Section 19(b). In the very proceeding at issue here, FERC specifically recognized that there was a distinction between the questions of its regulatory jurisdiction under NGA Section 1 and of the public convenience and necessity un-

[16] It is fundamental that this Court is without jurisdiction to decide the merits of any question that the lower courts lacked jurisdiction to decide. *See United States v. Corrick*, 298 U.S. 435, 440 (1936); *Mansfield C. & L. M. Ry. v. Swan*, 111 U.S. 379, 382-83 (1884).

der NGA Section 7(c), on the one hand, and the question of preemption of any assertedly applicable state law requirement, on the other. FERC explained that the preemption question had not yet arisen and would not arise until after a state court determined that the state franchise law applied. App., *infra*, 72a.[17] Then, in a brief to the Tenth Circuit in this case (which is not a Section 19 review proceeding), FERC urged the court of appeals to rule on the merits of the preemption question, something that the Tenth Circuit concluded that it could not do because the issue was committed exclusively to the jurisdiction of the D.C. Circuit under Section 19(b). *See* Brief of FERC at Amicus Curiae, pp. 6-8 (presenting substantive, not jurisdictional, arguments that application of the state's franchise law is preempted by the NGA).

3. In reaching its conclusion, the court of appeals relied chiefly on *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), but that reliance is misplaced for two reasons. First, the Court there held only that, when a question of federal preemption had actually been presented and decided in a Federal Power Commission (FPC) license proceeding as well as on judicial review of the FPC order, that question could not be relitigated in a subsequent state court suit. *See Cook v. Pan American World Airways, Inc.*, 771 F.2d 635, 641 (2d Cir. 1985), *cert. denied*, 474 U.S. 1109 (1986). In the present case, of course, the question of preemption was not

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[17] "[A] determination by the state court as to whether or not [Williams] requires authorization under the franchise law to install the pipeline in Oklahoma City has no bearing on our determination of whether the [pipeline] is in the public convenience and necessity. Should the state court determine that [Williams] needs authorization under the franchise law, the issue will be whether or not that determination is preempted by our certificate authorization." FERC made this statement in the same order in which it gratuitously opined that the state franchise law was preempted. *See* App., *infra*, 65a-66a n.5.

presented to FERC or on Section 19 review, so there can be no *issue* preclusion of the sort on which *Tacoma* was based. *Tacoma*'s holding was not one of *claim* preclusion, the concept applied by the Tenth Circuit here. *Tacoma* did not hold that state-court adjudication of a state-law claim like petitioner's is foreclosed if it has not been raised before the agency.

Second, and in any event, *Tacoma* did not involve the NGA. It involved the Federal Power Act, 16 U.S.C. § 791a *et seq.*, a statute that is different from the NGA in a critical respect. Section 9 of the Federal Power Act, 16 U.S.C. § 802—which is central to the *Tacoma* court's reasoning, *see* 357 U.S. at 326 n.9, 337 and n.17—requires the license applicant to give satisfactory evidence of compliance with applicable state law. That provision necessarily places before the agency (the FPC at the time of *Tacoma*, now FERC) the question of preemption of at least some state laws.[18] Under the Federal Power Act, therefore, the applicant must raise certain state law issues to the agency, and the validity of the certificate may turn in part on whether certain state law requirements are preempted. The NGA contains no provision like Section 9 of the Federal Power Act. Nothing in the NGA makes the validity of a FERC certificate turn on the answer to preemption questions, let alone requires a party opposing the certificate applicant to raise a state-law claim that does not allege a ground for not issuing the certificate or to anticipate a preemption argument on behalf of the applicant. In short, *Tacoma* does not support the Tenth Circuit's view that Section 19(b) of the NGA requires that FERC be presented with a state-law claim like petitioner's.[19]

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[18] Even in that setting, as Justice Harlan pointed out in concurrence, the Court did not hold that all questions of state law must be presented to the agency. 357 U.S. at 342.

[19] None of the other decisions cited by the court of appeals lends its conclusion any greater support. Every one of the circuit court decisions cited by the Tenth Circuit (App., *infra*, 10a-15a) in-

There are few matters of more importance to litigants than certainty about where to file a particular claim. The Tenth Circuit has now undermined that certainty for proceedings affected by the NGA, placing a limit on state-court jurisdiction that is not only contrary to the language of the Act but inconsistent with both precedent and common practice. Further review is needed.

II. THE COURT OF APPEALS SHOWED AN IMPROPER DISREGARD FOR THE JUDGMENTS OF STATE COURTS BY ORDERING THAT ENFORCEMENT OF THE STATE JUDGMENT AND ACCOMPANYING INJUNCTION BE ENJOINED.

The Tenth Circuit, having decided that the Oklahoma courts were ousted of jurisdiction over petitioner's suit, went on to declare that the district court should have enjoined enforcement of the state court's judgment. App., *infra*, 18a. The court of appeals reached this conclusion notwithstanding the facts, first, that the state court had already entered judgment and, second, that in so doing, the state court had expressly determined that it *did* have jurisdiction.[20] This affront to the state courts was wrong

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volved a challenge to the validity or lawfulness of the agency order at issue—not, as here, a claim that state law also applied to the holder of a valid agency license or certificate. *See McCulloch Interstate Gas Corp. v. FPC*, 536 F.2d 910 (10th Cir. 1976); *United States by Donovan v. Howard Elec. Co.*, 798 F.2d 392 (10th Cir. 1986); *United States v. McBride*, 788 F.2d 1429 (10th Cir. 1986); *County of Halifax, Va. v. Lever*, 718 F.2d 649 (4th Cir. 1983); *City of Rochester v. Bond*, 603 F.2d 927 (D.C. Cir. 1979). And the statute at issue in *Whitney Nat'l Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 424-45 (1965), included a provision that, like Section 9 of the Federal Power Act, placed before the federal agency certain issues concerning the application of state law. Bank Holding Company Act, § 7, 12 U.S.C. § 1846. As we have noted, the NGA contains no comparable provision.

[20] The state court made this determination in the face of respondents' extensive argument that the federal courts of appeals had exclusive jurisdiction over issues involving the FERC certificate and that the state court proceeding therefore amounted to a "collateral attack." *See* Motion for Summary Judgment and Brief in

even if the court of appeals' reading of the NGA was correct, and itself raises questions of considerable significance, warranting review by this Court.

It is a fundamental principle of our dual court system that federal courts may not enjoin state proceedings except under the narrowest of circumstances. The "general policy"—embodied in a number of separate, though related, doctrines—is that state proceedings " 'should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court.' " *Chick Kam Choo v. Exxon Corp.*, 486 U.S. at 146 (quoting *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 287 (1970)). For example, when a state court has rendered a judgment, the provisions of 28 U.S.C. § 1738 specifically provide that federal courts should accord that judgment no less respect than the state courts themselves would give to it. That respect does not ebb and flow according to whether the federal court agrees with the state decision; revision of the judgment, if needed, is to be pursued "by way of appeal through the state-court system and certiorari from this Court." *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525 (1986).[21]

Support Thereof at 16-19, filed by Williams Natural Gas Company, May 12, 1989. That the state court made no express mention of the question of the alleged "collateral attack" did not make the judgment any less an adjudication of it. *Grubb v. Public Utilities Comm'n of Ohio*, 281 U.S. 470, 477-78 (1929).

[21] In *Parsons Steel* the Court reversed a federal court of appeals' decision that, like the decision in this case, treated a prior state-court judgment as a nullity. There, as here, the federal court regarded the state-court judgment as invalid because it thought that the claim in that court should have been raised in prior federal litigation. This Court concluded that the action of the court of appeals had given "unwarrantedly short shrift to the important values of federalism and comity." 474 U.S. at 523.

Similar principles inform the so-called *Rooker* doctrine, which makes plain that federal courts are not to be used as substitutes for the state appellate courts in ruling upon the correctness of state-court holdings. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

In addition to these doctrines of finality, both Congress and this Court have placed strict limits on the authority of federal courts to enjoin ongoing state proceedings. "The Anti-Injunction Act [28 U.S.C. § 2283] generally prohibits the federal courts from interfering with proceedings in the state courts." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. at 145. As this Court has noted, "[b]y generally barring such intervention, the Act forestalls 'the inevitable friction between the state and federal courts that ensues from injunction of state judicial proceedings by a federal court.'" *Chick Kam Choo v. Exxon Corp.*, 486 U.S. at 146 (quoting *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630-31 (1977) (plurality opinion)). Likewise, this Court has recognized that principles of federalism and comity may counsel against the use of injunctive power by federal courts. *Younger v. Harris*, 401 U.S. 37 (1971); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987); *Juidice v. Vail*, 430 U.S. 327 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975).

The court of appeals below provided no adequate explanation for its decision to disregard these important checks upon lower federal-court interference with state courts. The court made no mention at all of Section 1738 or of Section 2283 or of *Younger*, and its treatment of *Rooker* largely depends on the idea that *Rooker* is inapplicable so long as the federal court finds a lack of jurisdiction in the state court. As a reading of *Rooker*, this idea is quite wrong. Whatever may be the case when a state court has not addressed the issue of its own juris-

diction, it is directly contrary to the principles reflected in *Rooker* for a federal court to set aside a state judgment for lack of jurisdiction when the state court has already ruled upon that question. There is no reason to suppose that state courts are especially prone to ignore governing federal law on matters of jurisdiction, and any such tendency—like any other refusal to apply federal law—can be reviewed by this Court after direct appeal through the state courts.

This Court, in fact, has frequently acknowledged that doctrines of finality are applicable to determinations about jurisdiction. *See, e.g., Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982); *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940). As the Court said in *Insurance Corp. of Ireland*, "[a] party that has had an opportunity to litigate the question of subject-matter jurisdiction may not . . . reopen that question in a collateral attack on an adverse judgment." 456 U.S. at 702 n.9. To the contrary, "[i]t has long been the rule that principles of res judicata apply to jurisdictional determinations—both subject matter and personal." *Ibid.* A federal court thus is not free to set aside state judgments whenever it believes that the state court erroneously assumed jurisdiction over the case. The court of appeals below did just that.

The injunction required by the court of appeals also cannot be justified on the ground that the state court action involves issues of federal preemption. Discussing the provisions of the Anti-Injunction Act, 28 U.S.C. § 2283, this Court has stated that a federal court may not "enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear." *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398

U.S. 281, 294 (1970). *See New Orleans Public Service, Inc. v. Council of City of New Orleans*, 109 S.Ct. 2506, 2516 (1989). Indeed, because issues of preemption often follow upon (and can be avoided by) resolution of state-law issues, it would be anomalous to place a special disability upon state courts in this area. *See* note 15, *supra*.

In short, the court of appeals' decision to block enforcement of the Oklahoma judgment on grounds already rejected by the state court—and to short-circuit the normal process of appeal through the state courts to this Court—violated the principles designed to maintain the proper balance between federal and state judicial power. This Court should grant the petition to correct that ruling.[22]

Review is warranted for another reason as well. Although we see no reason why this case should present an exception to the various doctrines limiting lower federal court interference with state courts, we recognize that certain questions about the limits of these doctrines have not been definitively and unambiguously resolved by this Court. In particular, fifty years ago, this Court indicated that, where Congress has conferred exclusive jurisdiction on the federal courts, it was permissible to treat certain state-court judgments as void. *See Kalb v. Feuerstein*, 308 U.S. 433 (1940). The present scope and weight of that authority are not clear. As the Court pointed out in a later case, *Durfee v. Duke*, 375 U.S. 106 (1963), the state courts in *Kalb* had not actually ruled upon the issue of their jurisdiction—whereas, in the present case, the state court expressly did so—but *Kalb*

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[22] Permitting the Tenth Circuit decision to stand would effectively foreclose any review of the merits of the state-law and federal preemption issues presented in state court. Because the state trial court's order is to be federally enjoined, any further proceedings in the Oklahoma Supreme Court would be pointless, and Williams might well dismiss its appeal in that court.

has never been explicitly limited to that situation, where no collateral relitigation of issues actually decided would occur. Moreover, the Court has addressed, but not finally settled, the extent to which *Younger* principles apply to civil cases involving purely private parties. *See New Orleans Public Service, Inc. v. Council of City of New Orleans*, 109 S.Ct. at 2517-18; *id.* at 2520-21 (Brennan, J., concurring); *id.* at 2521 (Rehnquist, C.J., concurring and concurring in judgment).

These are important questions involving the delicate balance between state and federal judicial authority. If there is to be a new exception to rules limiting interference with state-court judgments—one that involves the second-guessing of decisions by state courts regarding their own jurisdiction—that exception should be announced by this Court; if there is not to be such an exception, then the action taken by the court below should not be allowed to stand uncorrected. In either event, further review by this Court is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.[23]

Respectfully submitted,

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February 12, 1990

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[23] The issues in this case are closely related to those presented in *Consolidated Oil & Gas, Inc. v. Southern Union Co.*, No. 89-911, which involves the question of the respect that FERC and a federal reviewing court under Section 19 of the NGA must give to a state court judgment on NGA preemption. If the Court grants the petition in that case, the present petition should be granted as well, because this case involves the additional question of the propriety of the injunction against the state court order and because the Section 19 issues would be better understood if the Court had before it two different settings in which those issues arise. At a minimum, the present petition should be held pending final disposition of *Consolidated*. And even if the *Consolidated* petition is denied, the present petition should be granted, because this case raises a greater threat to the proper respect due state courts in our federal system and creates substantial uncertainty among litigants about what issues must be raised before FERC.

APPENDICES

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 89-6209, 89-6227 and 89-6228
(CIV-89-519)
(W.D. Okla.)

WILLIAMS NATURAL GAS COMPANY, a Utah Corporation,
Plaintiff-Appellant,

SMITH COGENERATION, INC., an Oklahoma Corporation,
and POWERSMITH COGENERATION PROJECT,
a limited partnership,
Plaintiffs-Intervenors-Appellants,

v.

THE CITY OF OKLAHOMA CITY, a Municipal Corporation,
and OKLAHOMA NATURAL GAS COMPANY,
a Delaware Corporation,
Defendants-Appellees.

[Filed Nov. 22, 1989]

Douglas E. Nordlinger of Skadden, Arps, Slate, Meagher & Flom, Washington, D.C. (J. Clayton La Grone, William R. Burkett & Steven L. Tolson of Hall, Estill, Hardwick, Gable, Golden & Nelson, Oklahoma City, Oklahoma; John S.L. Katz and John N. Estes of Skadden, Arps, Slate, Meager & Flom, Washington, D.C.; and S. Paul Hammons of Andrews, Davis, Legg, Bixler, Milsten &

Price, P.C., Oklahoma City, Oklahoma, on the briefs), for Plaintiff-Appellant and Plaintiffs-Intervenors-Appellants.

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Catherine C. Cook, General Counsel, Jerome M. Feit, Solicitor, and Katherine Waldbauer filed an Amicus Curiae brief for the Federal Energy Regulatory Commission.

Before McKAY, LOGAN, and BRORBY, Circuit Judges.

BRORBY, Circuit Judge.

This appeal arises from the United States District Court for the Western District of Oklahoma, where that court denied appellant's motion to construe federal condemnation rights under the Natural Gas Act and to disregard and stay the order of the Oklahoma County District Court. The order of the federal district court, issued May 30, 1989, effectively denied appellants full enforcement of a Federal Energy Regulatory Commission ("FERC" or "Commission") certificate authorizing appellants to construct and operate a natural gas pipeline to service the PowerSmith Cogeneration Project's ("PowerSmith") cogeneration facility in Oklahoma City.[1]

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[1] PowerSmith Cogeneration Project, Limited Partnership, is a developer of cogeneration projects (facilities that burn fuel for the production of electric and thermal energy, such as steam). PowerSmith is now completing construction of a 108-megawatt, $80

We find the state court lacked jurisdiction to entertain a collateral challenge to the FERC certificate and, accordingly, we REVERSE.

I. Statement of the Case

The dispute has its genesis in the competition between appellee Williams Natural Gas Company ("Williams") and appellant Oklahoma Natural Gas Company ("ONG") for the contract to transport natural gas to the PowerSmith facility—a competition eventually won by Williams. In order to service PowerSmith, Williams needed to construct a twelve-mile extension of an existing interstate pipeline to PowerSmith. As an interstate "natural-gas company" under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717-717z (1988), Williams could not construct or operate the extension without applying to and receiving from FERC, pursuant to § 7(c) of the NGA, 15 U.S.C. § 717f(c), an authorizing certificate of public convenience and necessity.

ONG is the local distribution company with a city franchise to sell, transport and distribute natural gas to the general public in Oklahoma City. The city franchise grants ONG the right to construct, operate and maintain facilities in the public streets and other public ways for its distribution purposes. Williams' pipeline construction would also require access to and use of the streets of Oklahoma City. Therefore, on October 18, 1988, before Williams was able to complete its application to FERC, ONG commenced the race to the courthouse and filed a declaratory judgment action in Oklahoma County District Court, asserting its franchise gives it the right to use City streets and to the exclusion of a nonfranchised transporter. Williams and PowerSmith answered on November 10, 1988, asserting as a defense that the NGA,

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million cogeneration facility in Oklahoma City, on the grounds of a tire manufacturing plant owned by Firestone Tire & Rubber Company. The facility is designed to burn natural gas.

15 U.S.C. §§ 717-717z, preempts Oklahoma franchise law and therefore Williams was not required to obtain a franchise.

On October 28, 1988, ten days after ONG had filed its action in state court, Williams applied to FERC for the certificate of public convenience and necessity authorizing the construction and operation of the PowerSmith pipeline. ONG responded by protesting and intervening in opposition to Williams' application. In its intervention, ONG contested FERC's jurisdiction to regulate the proposed pipeline, questioned the sufficiency and substance of Williams' application and urged the Commission to explore alternative proposals.

More specifically, in its challenge to FERC's jurisdiction, ONG argued that the facilities proposed by Williams should be subject to local rather than federal regulation: "[T]he proposal, notwithstanding that it is cast as an application to expand service by an interstate pipeline, in fact relates to service in the nature of distribution or intrastate transportation," and "[a]s such, the facilities are local in nature and should be subject not to FERC jurisdiction, but rather to local regulation . . . ." Indeed, ONG argued, "[t]his case cries out for local, not federal, regulation."

On February 16, 1989, after denying ONG's request for a hearing in the matter, FERC granted Williams a certificate authorizing and directing Williams to construct and operate the PowerSmith pipeline. As to ONG's jurisdictional contentions, FERC found that the facilities proposed by Williams were within its jurisdiction and therefore subject to subsections (c) and (e) of § 7 of the NGA, 15 U.S.C. § 717f(c), (e). *Williams Natural Gas Co.*, 46 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,160 (1989). In support of this finding FERC determined that the facilities proposed bore little resemblance to a local distribution system. Further, incorporating language from its previous decision in *Panhandle*

Eastern Pipeline Co., 42 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,076 (1988), the Commission stated,

> "[I]rrespective of any local effects resulting from the by-pass, we believe that the transportation service at issue here essentially concerns Federal interests, that is, those embodied in developing interstate transportation policy that provides consumers with a variety of supply options by promoting a competitively priced spot market for natural gas."

Williams, 46 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,160 at 61,559 (quoting *Panhandle*).

On March 1, 1989, ONG filed with FERC a Request for Rehearing and Motion to Stay the FERC Order. FERC denied ONG's motion to stay on March 31, 1989, and denied ONG's request for rehearing on May 31, 1989. 47 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,308, 1989 FERC LEXIS 1363.[2]

Also on February 16, 1989, the same day FERC issued its order, the Oklahoma state court ruled in ONG's declaratory judgment action. The court held, under Oklahoma law, ONG's franchise insulates it from competition in Oklahoma City from nonfranchisees. The state court specifically reserved for a later time (pending study of further briefs to be submitted by the parties) the issue whether federal law preempts the requirements of Oklahoma law and, thus, whether the authority of a FERC certificate negates the Oklahoma franchise requirement.

On March 28, approximately six weeks after the orders of FERC and the state court had been issued, Williams brought an action to enforce the FERC certificate in the United States District Court for the Western District of

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[2] ONG subsequently filed a petition for review of the FERC orders with the United States Court of Appeals for the District of Columbia Circuit. *Oklahoma Natural Gas Co. v. FERC*, No. 89-1376 (D.C. Cir. filed June 12, 1989). Williams and PowerSmith have moved to transfer that petition for review to this Court.

Oklahoma pursuant to § 7(h) of the NGA, 15 U.S.C. § 717f(h). Specifically, Williams sought to condemn rights of way across city streets to construct and operate the PowerSmith pipeline under the FERC certificate and to quiet Williams' title to those rights of way as against ONG's franchise rights. Thereafter, by order of April 18, the federal district court authorized Williams to condemn city rights of way "for the purpose of laying a pipeline" pursuant to the FERC certificate. However, the court's order made no mention of Williams' ability to "operate" the pipeline.

In response, on April 28, ONG sought and obtained from the state district court a temporary restraining order ("TRO") enjoining Williams from constructing the pipeline across city streets. On May 1, the federal district court responded by enjoining enforcement of the state TRO, finding that it interfered with its jurisdiction and order permitting the construction. However, in issuing this order, the federal court declined to enjoin the state court's consideration of the preemption issue and abstained from ruling on the question of federal preemption because that issue had been first presented to the state court.

On May 11, Williams and PowerSmith requested the federal district court to reconsider its decision to abstain and again requested the court to enjoin the state court's consideration of the preemption question. However, on May 19, while this motion to reconsider was pending, the state court decided the preemption issue before it, holding the FERC certificate did not preempt the state franchise requirement. The state court therefore permanently enjoined the construction and operation of the pipeline, notwithstanding the authority of the FERC certificate.[3]

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[3] FERC, in its decision of May 31 declining ONG's request for a rehearing, expressed its complete disapproval of the state district court's decision and reaffirmed its conclusion that Williams' pro-

After the state court granted its injunction, the federal district court issued its final order on May 22, granting the condemnation rights to Williams "for the purpose of the construction, maintenance and operation" of the pipeline. The court then held a hearing on May 24 to consider a further request by Williams and PowerSmith to construe federal condemnation rights under the NGA and to stay the enforcement of the state court order to the extent it interfered with the May 22 condemnation order. Williams and PowerSmith argued the state court injunction was an impermissible infringement upon the federal district court's exclusive condemnation jurisdiction under § 7(h) to enforce the FERC certificate. After further briefing by the parties, the federal court, in an order issued May 30, refused to grant further injunctive relief and declined to alter its previous decision to abstain. The court concluded that the intervening state court decision on preemption had effectively deprived the federal courts of authority to reverse or reconsider the issue. The court believed itself bound by the doctrine of *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923), to defer to the state court's decision, with appellate relief available to Williams only through the Oklahoma Supreme Court.[4] However, the court certified the matter for immediate review to this court under 28 U.S.C. § 1292(b).[5]

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posed service to PowerSmith would benefit the public interest. *Williams Natural Gas Co.*, 47 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,308; 1989 FERC LEXIS 1363.

[4] An appeal to the Oklahoma Supreme Court is pending from the decision of the District Court for Oklahoma County, Oklahoma, captioned *Smith Cogeneration, Inc. v. Oklahoma Natural Gas Co.*, No. 73649 (Okla. filed July 18, 1989).

[5] Prior to oral argument, the appellants petitioned this court for emergency injunctive relief. We denied the relief requested in our order of July 24, 1989. Apparently in response to statements of the court at oral argument, appellees submitted a notice to this court of changed circumstances regarding appellants' emergency petition. We have not considered this material as it is in violation of Fed. R. Civ. P. 28(c) and 10th Cir. Rule 31.2.1.

II. *Analysis*

The issues presented to this court in the parties' briefs focus primarily on the merits of the federal district court's order of May 30, 1989. Thus framed, we are urged to decide whether the district court, relying upon the *Rooker* doctrine, erred by abstaining from deciding the question of federal preemption and by refusing to enjoin enforcement of the state court decision. Additionally, the appellants urge this court to decide the underlying substantive issues of whether the Oklahoma franchise requirement is preempted by the NGA and/or invalid under the commerce clause. However, we cannot even attempt to address these issues until we air certain core jurisdictional issues that lurk beneath the surface of the controversy.

In an introduction to their brief, appellants present a three-part analysis of what they view to be the exclusive jurisdiction of FERC to handle the issues of this case. First, appellants submit FERC is empowered with the exclusive authority to regulate the interstate transportation of natural gas and, accordingly, the Power-Smith pipeline. Thus, they argue, the state proceeding was barred from the outset. Secondly, they argue the provisions of NGA § 19(b), 15 U.S.C. § 717r(b) (1988), create the exclusive avenue for judicial review of FERC orders. Third, and as a corollary to the second, appellants contend the validity and conditions of a FERC certificate cannot be collaterally attacked in federal district court during an eminent domain proceeding pursuant to NGA § 7(h).

We choose not to address the appellant's first jurisdictional point for two reasons. First, so expansive an argument virtually assumes the conclusion of the underlying, substantive federal preemption question.[6] Second,

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[6] We note, without comment, the recent decision of the United States Court of Appeals for the Sixth Circuit in *Michigan Con-*

and more importantly, we view this argument to be unnecessary to determine the proper jurisdictional course here, where FERC issued its certification order before the state court entertained issues of federal jurisdiction or preemption. We proceed to the second part of appellants' jurisdictional analysis.[7]

A. The Exclusive Judicial Review Provisions of NGA § 19.

It is well established that Congress, acting within its constitutional powers, may prescribe the procedures and conditions under which, and the courts in which, judicial review of administrative orders may be had. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958). Thus, we begin our jurisdictional analysis with the statutorily provided means for contesting a FERC certificate issued pursuant to § 7(c) of the NGA. First, § 19(a) of the NGA, 15 U.S.C. § 717r(a), provides in pertinent part:

> (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person . . . is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing

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solidated Gas Co. v. Panhandle Eastern Pipe Line Co., 887 F.2d 1295 (6th Cir. 1989), which held that Michigan's authority to regulate the interstate transportation of natural gas in the "bypass" of a local distribution company is preempted by the Natural Gas Act. As explained herein, we do not reach the merits of the preemption issue.

[7] Issues of jurisdiction are questions of law requiring *de novo* review. *Walden v. Bartlett*, 840 F.2d 771, 772-73 (10th Cir. 1988).

> or to abrogate or modify its order without further hearing.

Consistent with these requirements, ONG timely filed on March 1 its request for a rehearing before FERC. After that request was denied by FERC on May 31, ONG further pressed its appeal to the Court of Appeals for the District of Columbia Circuit, in accordance with § 19 (b) of the NGA, 15 U.S.C. § 717r(b):

> (b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. . . . *Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part.* No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. . . . The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(Emphasis added.)

As the statutory language plainly states, the special judicial review provisions of § 19 are exclusive. *McCul-*

loch Interstate Gas Corp. v. Federal Power Comm'n, 536 F.2d 910, 913 (10th Cir. 1976) (citing *Whitney Nat'l Bank v. Bank of New Orleans Bank & Trust Co.*, 379 U.S. 411, 420, 422 (1964)). The provisions of § 19 are nearly identical to the judicial review provisions of various other federal regulatory programs. In each case, these provisions have been interpreted to establish an exclusive scheme of review. *See, e.g., City of Tacoma*, 357 U.S. at 334-36 (interpreting the provisions of Federal Power Act ("FPA"), § 313(b), 16 U.S.C. § 8251 (b)); *United States by Donovan v. Howard Electric Co.*, 798 F.2d 392, 395 (10th Cir. 1986) (Occupational Safety and Health Act, 29 U.S.C. § 660(a)); *United States v. McBride*, 788 F.2d 1429, 1432 (10th Cir. 1986) (Federal Aviation Act ("FAA"), 49 U.S.C. § 1486(a), (d)); *County of Halifax, Va. v. Lever*, 718 F.2d 649, 652 (4th Cir. 1983) (FPA, § 313(b), 16 U.S.C. § 8251(b)); *City of Rochester v. Bond*, 603 F.2d 927, 934-35 (D.C. Cir. 1979) (FAA, 49 U.S.C. § 1486(a), (d)).

The watershed case in this regard was *City of Tacoma*. In *City of Tacoma*, the City sought to obtain a license from the Federal Power Commission ("FPC") to construct a power project on the Cowlitz River in the state of Washington. One of the project's dams would result in the total inundation of a state-owned fish hatchery. The State intervened and participated in the hearings before the Commission and alleged, *inter alia*, that the project would violate a state law, Wash. Rev. Code § 75.20.010, which required the State's permission to construct any dam exceeding certain size specifications. Shortly thereafter the Commission granted the license. The State then petitioned for a rehearing, which was denied.

Pursuant to § 313(b) of the FPA, the State petitioned for a review of the Commission's order before the Court of Appeals for the Ninth Circuit, where the FPC's decision was affirmed. The Supreme Court denied certiorari. In a subsequent state proceeding, the City sought

a judgment declaring valid a large issue of revenue bonds to finance the construction of the project. The State answered and filed a cross-complaint alleging that the project would interfere with the navigation of the Cowlitz River, in violation of state law Wash. Rev. Code § 80.40.010. The state trial court entered judgment in favor of the State and enjoined the City from constructing the project. The Supreme Court of Washington affirmed. The United States Supreme Court reversed, finding the objections raised in state court to the FPC license to be "impermissible collateral attacks" under § 313(b):

> [Section 313(b) of the Federal Power Act] is written in simple words of plain meaning and leaves no room to doubt the congressional purpose and intent. . . . It thereby necessarily precluded *de novo* litigation between the parties of all issues inhering in the controversy, and all other modes of judicial review.

357 U.S. at 335-36.

Judicial review under § 19(b) is exclusive in the courts of appeals once the FERC certificate issues. *Cf. Whitney Nat'l Bank*, 379 U.S. at 421-22. In *Whitney Nat'l Bank*, the Court applied *City of Tacoma*, to hold that, under the Bank Holding Company Act of 1956, challengers to a determination of the Federal Reserve Board must first bring their attack before the Board, subject only to review by the court of appeals. This review structure parallels that of § 19, where parties must first appeal to FERC.[8]

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[8] Linguistically, the language of § 19(b) providing for exclusive jurisdiction "upon the filing of such petition" with the court of appeals might permit a separate action if a federal or state court reviews an agency order before a petition for review can be filed, or if a petition is never filed. However, to allow parties to circumvent the scheme of judicial review under § 19 simply by choosing not to file a petition for review with FERC or the court of appeals would be to allow precisely the type of collateral challenge that *City*

Thus, a challenger may not collaterally attack the validity of a prior FERC order in a subsequent proceeding. *McCulloch*, 536 F.2d at 913 (quoted in *Howard Electric*, 798 F.2d at 394). Moreover, the prohibition on collateral attacks applies whether the collateral action is brought in state court, *e.g.*, *City of Tacoma*, or federal court, *e.g.*, *McCulloch*. Our interpretation of § 19 is entirely consistent with § 10(b) of the Administrative Procedure Act, 5 U.S.C. § 703 (1976), which provides "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence of inadequacy thereof, any applicable form of legal action. . . ." *Cf. City of Rochester v. Bond*, 603 F.2d at 935.

Furthermore, we see nothing in the substantive character of ONG's challenges to the FERC order that would exempt those arguments from the statutory appellate scheme. Here again, *City of Tacoma* is helpful. There the Supreme Court read § 313(b) of the FPA to "necessarily preclude[] *de novo* litigation between the parties of *all issues inhering in the controversy*." 357 U.S. at 336 (emphasis added). We would be hard pressed to formulate a doctrine with a more expansive scope.

Additionally, we fail to find provision in § 19 of the NGA for the bifurcation of judicial review along sub-

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of Tacoma condemned and would defeat the "exclusive" review provisions of § 19(b). *City of Rochester v. Bond*, 603 F.2d at 935 (collateral challenge violated an exclusive statutory scheme of judicial review even where the challenger to an order of the Federal Aviation Administration was not a party to the administrative proceedings, had no actual notice of such proceedings, and thus failed to timely file a petition for review in the court of appeals). *See also, McBride*, 788 F.2d at 1432-33 (collateral action impermissible where the challenger to an agency order failed to file a timely appeal under the applicable statute); *County of Halifax, Va. v. Lever*, 718 F.2d at 651 (collateral action impermissible where the challenger to a FERC permit deliberately declined to press for relief through the available statutory means in favor of a collateral action in federal district court).

stantive lines. This is not surprising, however, given that such a procedure would negate most of the benefits attending the "exclusive" scheme of review. In *City of Rochester v. Bond*, the D.C. Circuit addressed this same issue when it confronted a collateral challenge to a determination of the Federal Aviation Administration based on another federal statute, the National Environmental Policy Act ("NEPA"):

> First, we disagree that the district court may exercise concurrent jurisdiction merely because a violation of NEPA is alleged. The allegation may be raised directly in the courts of appeals; and insofar as it may affect the lawfulness of a directly appealable order we think it must be. . . .
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> The rationale for statutory review is that coherence and economy are best served if all suits pertaining to designated agency decisions are segregated in particular courts. The choice of forum is, as we have said, for Congress and we cannot imagine that Congress intended the exclusivity *vel non* of statutory review to depend on the substantive infirmity alleged. The policy behind having a special review procedure in the first place similarly disfavors bifurcating jurisdiction over various substantive grounds between district courts and the court of appeals. The likelihood of duplication and inconsistency would exist in either case.

603 F.2d at 936 (footnotes omitted).

Here, however characterized, the state court's consideration of the preemption issue ultimately challenges FERC's determination of its own jurisdiction. Jurisdiction is not an issue with which FERC is unfamiliar or which it is incapable of addressing on appeal. In fact, as we have previously held, the "mode of challenging an agency's jurisdictional decision is by direct attack." *Howard Electric*, 798 F.2d at 394, and *McCulloch*, 536

F.2d at 913 (both citing *Callanan Road Co. v. United States*, 345 U.S. 507, 512 (1953)).

As we have already chronicled, ONG contested the jurisdiction of FERC in its original intervention and protest before the Commission. ONG's jurisdictional arguments were laced with the theme of conflict between state and federal regulation. (However, whether intentionally or unintentionally, ONG never expressly advanced those arguments in terms of "preemption.") FERC responded in kind by discussing, in its order of February 19, 1989, its view as to why the pipeline was essentially a federal concern and subject to its jurisdiction. *Williams Natural Gas Co.*, 46 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,160, at 61,559 (1989).

ONG again raised the preemption argument in everything but name in its request for rehearing before FERC. In its specification of errors, ONG contended the Commission erred in failing to find that the PowerSmith facilities, and the activities thereon, were matters of local interest which are not subject to FERC jurisdiction, but rather are subject to the jurisdiction of the Oklahoma Corporation Commission. Although this argument expressly hinged on the language of § 1(b) of the NGA, 15 U.S.C. § 717(b),[9] ONG argued more broadly:

> When enacting the NGA, . . . Congress created a dual state-federal regulatory scheme over natural gas. The manifest purpose in enacting the NGA was to close regulatory gaps by complementing and

[9] Section 1(b) of the NGA, 15 U.S.C. § 717(b) provides:

> (b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

> strengthening state regulation. *See Panhandle Eastern Pipe Line Co. v. Indiana Public Service Comm.*, 332 U.S. 507 (1947). Moreover, "Congress did not desire comprehensive federal regulation; much authority was reserved for the States. . . ." *Transcontinental Gas Pipe Line Corp. v. Federal Power Comm.*, 365 U.S. 1, 19 (1961).
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> . . . Thus, while Congress made sales for resale and the transportation of natural gas in interstate commerce subject to federal regulation, Congress expressly withheld from federal regulatory jurisdiction all other transportation of natural gas.

In denying the rehearing request, FERC once more expressed its view on the subject of federal jurisdiction, noting that it completely disapproved of the conflicting state opinion. *Williams Natural Gas Co.*, 47 Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 61,308, at n.5 (1989), 1989 FERC LEXIS 1363.

However, our conclusion does not depend on a finding that ONG implicitly or expressly submitted the preemption issue to FERC. Instead, it is sufficient to hold that the issue could have and should have been raised before FERC. Again, the analysis of the Supreme Court in *City of Tacoma* is instructive:

> We think these recitals show that the very issue upon which the respondents stand here was raised and litigated in the Court of Appeals and decided by its judgment. But even if it might be thought that this issue was not raised in the Court of Appeals, it cannot be doubted that it could and should have been, for that was the court to which Congress had given "exclusive jurisdiction to affirm, modify, or set aside" the Commission's order. And the State may not reserve the point, for another round of piecemeal litigation, by remaining silent on the issue while its

> action to review and reverse the Commission's order was pending in that court. . . .

357 U.S. at 339.[10]

We need not reach the question of whether the various arguments by ONG in FERC proceedings were sufficient, for purposes of § 19(b), to permit argument on the preemption issue before the D.C. Circuit. Nor do we feel compelled to explore whether ONG has, in fact, submitted the issue to that court. We hold only that ONG could have and should have raised the preemption issue before FERC originally or upon its motion for rehearing. The issue may be advanced by direct attack, pursuant to the appellate structure of § 19(b), or not at all. *City of Tacoma*, 357 U.S. at 336. Accordingly, because ONG filed its petition for review under § 19(b) with the United States Court of Appeals for the D.C. Circuit, this court cannot reach the merits of the preemption issue.

The structure Congress has provided to litigate and resolve disputes arising under the Natural Gas Act should not be lightly disregarded. In the instant case it is apparent that ONG filed its action in state court as a "preemptive strike." It makes little sense for the state court action to have been filed unless ONG at the time of filing knew or had reason to believe that Williams would be awarded the requisite certificate of public convenience and necessity. The roadway to resolution of the dispute between Williams and ONG has been both charted and mandated by Congress. It makes no sense to permit the parties to chart their own route and thus allow piecemeal and unending litigation to ensue.

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[10] Although the *City of Tacoma* court did not find it necessary to hinge its conclusion upon an extra-statutory doctrine such as res judicata, estoppel, collateral estoppel, or waiver, 357 U.S. at 336-37, in *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966), the court held that res judicata principles may apply to an administrative agency's adjudication.

We hold that the proceedings in the state court that resulted in the order enjoining Williams' exercise of rights granted in the FERC certificate constituted an impermissible collateral attack on a FERC order in contravention of § 19 of the NGA. Thus, the federal district court erred in refusing to enjoin the enforcement of the state court injunction. We also hold that a collateral challenge to the FERC order could not be entertained by the federal district court. We agree with the appellants that the eminent domain authority granted the district courts under § 7(h) of the NGA, 15 U.S.C. § 717f(h), does not provide challengers with an additional forum to attack the substance and validity of a FERC order. The district court's function under the statute is not appellate but, rather, to provide for enforcement. *See McBride*, 788 F.2d at 1432 (addressing an enforcement action under the FAA, 49 U.S.C. § 1487).

B. *The Rooker Doctrine.*

Finally, we do not view our conclusion that the state court lacks appellate jurisdiction over the FERC determination to be at odds with the doctrine of *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923). Instead, we consider it *Rooker*'s necessary complement.

In *Rooker*, the Supreme Court held that the lower federal courts do not have appellate jurisdiction to review state court decisions. Such jurisdiction is vested only in the state appellate courts and in the Supreme Court of the United States. 263 U.S. at 416. The rule applies even when the state court decision is challenged as unconstitutional, *id.*; *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983); *Van Sickle v. Holloway*, 791 F.2d 1431, 1436 (10th Cir. 1986), or when the state court erroneously decides a federal question, *see Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1142 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987).

As the Supreme Court articulated in *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 286, (1970), the *Rooker* doctrine is a necessity in a nation with two separate legal systems:

> [T]his dual system could not function if state and federal courts were free to fight each other for control of a particular case. Thus, in order to make the dual system work and "to prevent needless friction between state and federal courts," *Oklahoma Packing Co. v. Gas Co.*, 309 U.S. 4, 9, (1940), it was necessary to work out lines of demarcation between the two systems.

However, the *Rooker* "line of demarcation" and the principles of comity it represents, cannot be observed unilaterally if it is to achieve its desired effects. Just as the federal courts lack jurisdiction to review the decisions of the state courts, so also must state courts defer to the federal appellate process mandated by Congress.[11] What is sauce for the goose is also sauce for the gander. Otherwise, the "needless friction" that *Rooker* seeks to prevent would be commonplace.

Here, despite the existence of the prior FERC determination and the exclusive review provisions of § 19, the state court proceeded to decide a question that could have and should have been raised before FERC and, based on its determination of that issue, enjoined enforcement of the FERC order. We do not dispute the assertion of the

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[11] This requirement is akin to the reciprocal nature of res judicata principles between the state and federal courts.

> It would be unthinkable to suggest that state courts should be free to disregard the judgment of federal courts, given the basic requirement[s] that . . . federal courts must honor state court judgments. . . . The requirement that federal court judgments command at least the central core of res judicata effects in state courts is "indispensable to federalism."

18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4468, at 648-49 (1981) (footnotes omitted).

appellees that the Oklahoma courts have jurisdiction to decide questions of federal preemption. *See, e.g., Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, ——, 108 S. Ct. 1684, 1691 (1988). However, that issue was not advanced in a vacuum. Preemption was considered by the state court only after the FERC certificate issued and after the exclusive judicial review provisions of § 19 attached.[12] Consequently, the state action crosses the *Rooker* boundary, just as a federal court exceeds its jurisdiction when it disregards the exclusivity of a state's ongoing appellate process. This court will not misuse *Rooker* to shield a state court injunction that runs afoul of the very principles of comity that lay at *Rooker*'s base.[13]

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[12] Appellees also assert that *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961), is dispositive here. We obviously disagree. The state court proceeding there was not a collateral challenge to a FERC order and thus was not violative of § 19. Instead, the state court action was brought simply to enforce the terms of a contract.

A customer of Pan American sought to recover certain overpayments made to Pan American after an order of the Kansas Corporation Commission was declared invalid. By amended contract, refund of the overpayments was conditioned on such declaration. Earlier, Pan American had filed its rate schedules with the FPC, along with the basic contracts underlying those rates. Therefore, Pan American argued the rate could only be changed pursuant to § 19 of the NGA. However, the actions of the FPC did not serve to abrogate the basic contract between the parties and the Court held that the state court was not deprived by the provisions of § 19 or § 22 of jurisdiction to decide questions of state contract law. 366 U.S. at 662-63.

[13] As counsel for appellees expressed at oral argument, appellees would have us apply *Rooker* to bar the D.C. Circuit from reaching the preemption issue during its review of FERC certificate. This would be akin to allowing a federal district court's review of a state decision to thereafter deprive state appellate courts of jurisdiction to hear the same issue. Such a result is impermissible under *Rooker*.

Thus, it is our view that the deference afforded the decisions of state courts under *Rooker* is not warranted where, as here, a state court has erroneously taken appellate jurisdiction over issues that have been previously decided by a federal agency, or when review of those issues could have and should have been sought pursuant to the federal statutory scheme.

C. *Conclusion*

We therefore hold, upon the issuance of a FERC certificate pursuant to § 7(c) of the NGA, 15 U.S.C. § 717f (c), the provisions of § 19(a)-(b) provided the exclusive course for judicial review of the FERC decision and barred collateral attack in either the state or federal district courts as to those issues that could have been raised in the FERC proceeding or appeal. The appellees have chosen the wrong roads, state and federal, for challenging FERC's order. They are left with their appeal before the Court of Appeals for the District of Columbia and, to the extent they have complied with the provisions of § 19(b), will be able there to present all of their challenges to the validity of the FERC certificate.

Accordingly, the judgment of the district court is REVERSED and the cause REMANDED for further proceedings consistent with this opinion.

APPENDIX B

IN THE DISTRICT COURT
OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

No. CJ-88-10553

OKLAHOMA NATURAL GAS COMPANY, a division of ONEOK INC., a Delaware corporation,
Plaintiff,

v.

SMITH COGENERATION, INC., an Oklahoma corporation; POWERSMITH COGENERATION PROJECT, a Delaware limited partnership; WILLIAMS NATURAL GAS COMPANY, a Deleware corporation; and LADD PETROLEUM CORPORATION, a Delaware corporation,
Defendants.

[Entered Feb. 16, 1989; Filed May 1, 1989]

ORDER GRANTING MOTION OF PLAINTIFF, OKLAHOMA NATURAL GAS COMPANY, FOR PARTIAL SUMMARY JUDGMENT AND OVERRULING MOTIONS OF DEFENDANTS FOR PARTIAL SUMMARY JUDGMENT

Now on this 16th day of February, 1989, this matter comes on for hearing on the Motion for Summary Judgment of Plaintiff, Oklahoma Natural Gas Company ("ONG"), the Motion for Summary Judgment of Defendants, Smith Cogeneration, Inc. and PowerSmith Cogeneration Project and the Motion for Summary Judgment of Defendants, Williams Natural Gas Company and

Ladd Petroleum Company. Plaintiff, ONG, appeared by and through its counsel, Curtis M. Long of Huffman Arrington Kihle Gaberino & Dunn and Thomas J. Enis of Fellers, Snider, Blankenship, Bailey & Tippens; defendants, Smith Cogeneration, Inc. and PowerSmith Cogeneration Project, appeared by and through its counsel, S. Paul Hammons of Andrews, Davis, Legg, Bixler, Milsten & Price; and defendants, Williams Natural Gas Company ("Williams"), and Ladd Petroleum Corporation, appeared by and through their counsel, J. Clayton LaGrone and William R. Burkett of Hall, Estill, Hardwick, Gable, Golden & Nelsen, P.C.

The Court has carefully examined and considered the motions and briefs of the parties, has studied the pertinent legal authorities and has been appraised of the following stipulations of counsel, made, in open court, at the commencement of the hearing:

As stipulated by the parties, the issues presently before the Court are ripe for decision under Rule 13 of the Rules of the District Courts of the State of Oklahoma; any issues of fact in dispute, such as the extent of the claimed loss of business set forth by ONG, are not material to a determination of the franchise issue currently before the Court; and the issues are submitted to the Court upon the briefs of the parties without oral argument.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Cross-Motions for Summary Judgment are properly before the Court for decision, that there are no disputed issues of fact material to the decision of the Court and that this Court has jurisdiction of the parties and of the subject matter.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment of plaintiff, ONG, is granted and that the franchise of ONG grants it the right to construct, operate and maintain facilities in the public streets and other public ways for the purpose of transporting, distributing and selling nat-

ural gas to the inhabitants of Oklahoma City and such privilege includes the right to use and occupy the streets for such purpose exclusively without competition, such as that activity proposed by Williams, except from another franchise holder, and the Motions for Summary Judgment of defendants are denied.

The Court reserves its ruling on the issue of whether federal law preempts the requirements of Williams obtaining a franchise from the City of Oklahoma City pending study of further briefs to be submitted by the parties herein.

/s/ David M. Cook
DAVID M. COOK
District Judge

APPROVED AND AGREED:

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ONG-Order 1-A

IN THE DISTRICT COURT
OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

No. CJ-88-10553

OKLAHOMA NATURAL GAS COMPANY,
a division of ONEOK Inc.,
a Delaware Corporation,
Plaintiff,

v.

SMITH COGENERATION, INC., an Oklahoma corporation; POWERSMITH COGENERATION PROJECT, a Delaware corporation; WILLIAMS NATURAL GAS COMPANY, a Delaware corporation; and LADD PETROLEUM COMPANY, a Delaware corporation,
Defendants.

[Filed May 19, 1989]

DECLARATORY JUDGMENT

The facts in this case are undisputed. For many years Oklahoma Natural Gas Company (ONG) has been engaged in the business of distributing and selling natural gas to its Oklahoma City customers under a franchise. The current franchise was granted by the city voters on April 24, 1985. On October 18, 1988, ONG filed its petition herein asking judicial declaration of its franchise rights as against the named defendants.

Smith Cogeneration, Inc. and Powersmith Cogeneration Project (hereinafter collectively referred to as

Smith), executed a contract with Ladd Petroleum Company to purchase gas, which Ladd will deliver to Smith at a point outside Oklahoma City. Williams Natural Gas Company (Williams) has agreed to build a pipeline and deliver the gas to Smith's plant, located within the municipal limits of Oklahoma City. Williams, without obtaining a franchise from the voters of Oklahoma City, will use the public streets of Oklahoma City to provide this service to Smith.

Two questions of law are submitted for the Court's determination. Summarized, those questions are:

1. Is Williams required to obtain a franchise from the voters of Oklahoma City to use the public streets of the city in order to transport the natural gas to Smith?

2. Does the Natural Gas Act (NGA)[1] pre-empt state law?[2]

All parties stipulated that this Court should first address the franchise question, because a ruling adverse to ONG would render the pre-emption issue moot. The Court approved counsels' stipulation to bifurcate the issues. After submission of briefs on the franchise issue, this Court ruled that under the stipulated facts herein, Oklahoma law requires Williams to obtain a franchise from the voters of Oklahoma City.[3]

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[1] Natural Gas Act of 1938, 15 U.S.C. §§ 717-717w.

[2] Okla. Const., Art. XVIII, § 5(a).

[3] Upon application of ONG, this Court also issued a temporary injunction against Williams, dated April 28, 1989, enjoining Williams from constructing a pipeline in the city of Oklahoma City pending determination of the pre-emption issue.

On October 28, 1988, (10 days after ONG filed its petition in this case), Williams applied to the Federal Energy Regulatory Commission (FERC) for a certificate of convenience and necessity. It thereby sought authority to construct and operate the pipeline here in dispute under § 7(c) of the NGA. FERC granted the Certificate

The pre-emption issue has been submitted to this Court on briefs. Oral argument was heard on May 18, 1989. This Court finds that it has jurisdiction of the parties and the subject matter of this dispute.[4]

Direct retail sale of natural gas is a matter of local concern because of adverse economic effects on local consumers resulting from impermissible or undesirable competition.[5] However, Williams does not propose to sell gas to Smith or any other consumer located within the geographical limits of Oklahoma City. It intends to *transport* the gas into the geographical limits of Oklahoma City for the sole purpose of delivery to Smith. This results in a "transportation bypass" of the local distribution company, ONG. Thus, the issue here is whether "transportation bypass" of ONG is a matter of exclusive federal jurisdiction or is of local concern subjecting such transaction to local regulatory authority. Research fails to disclose a case factually identical to the case before this Court.

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on February 16, 1989. Thereafter, on March 28, 1989, Williams filed a complaint in the United States District Court for the Western District of Oklahoma, styled *Williams Natural Gas Company v. The City of Oklahoma City and Oklahoma Natural Gas Company*, No. CIV-89-519-T, seeking to condemn city property for the purpose of constructing the pipeline and a determination that title to such condemned property be quieted and confirmed as against the rights of ONG. On May 1, 1989, U.S. District Judge Wayne Alley stayed this Court's temporary injunction, finding that this Court proceeding "is an interference" with the federal court's jurisdiction. In so doing, Judge Alley further stated: "The issue of pre-emption having been presented to the state court, this court will not proceed to decide that issue in advance of the state court decision on the issue if that be made within a reasonable time."

[4] *Chick Kam Choo v. Exxon Corp.*, —— U.S. ——, 108 S.Ct. 1684 (1988); *Cities Service Gas Company v. Oklahoma Tax Commission*, 60 Okla. B.J. 1129 (Okla. May 2, 1989).

[5] *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Ser. Comm'n.*, 341 U.S. 329, 71 S.Ct. 777 (1951).

This Court concludes that "transportation bypass" like "sale bypass" of ONG's exclusive right to the use of the public streets of Oklahoma City under its franchise constitutes competition with a franchised public utility, resulting in adverse economic effects on the local utility customers. "Transportation bypass" proposed by these defendants may have a more profound adverse effect on the price of gas that ONG's customers will be compelled to pay for their gas than a "Sale bypass" transaction.[6] Such a matter is of legitimate local concern, and the means chosen by the State of Oklahoma is plausibly related to that concern. The Oklahoma Constitutional requirement of a franchise does not have as its central purpose the regulation of matters Congress intended to regulate.[7]

Federal regulation of the natural gas industry was not intended to oust state jurisdiction over matters of essentially local concern such as found here—"transportation bypass" service to consumers located within the geographical limits of Oklahoma City without first obtaining a franchise from the voters of the city. This Court concludes that federal law does not pre-empt Oklahoma law under the facts presented in this case. Therefore, Williams does not have the right to use any of Oklahoma City's streets, alleys or other public rights-of-way for the purpose of laying pipelines and other equipment neces-

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[6] See Affidavit of James A. Metcalf, Jr. and his supporting calculations, Exhibit 1 to ONG's Amendment to its Brief in Support of its Motion for Summary Judgment on Pre-emption Issue, filed herein May 5, 1989.

[7] *Pacific Gas & Elec. Co. v. State Energy Resources Comm'n.*, 461 U.S. 190, 103 S.Ct. 1713 (1983); *Northwest Central Pipeline Co. v. State Corp. Comm'n.*, —— U.S. ——, 109 S.Ct. 1262 (1989); *California v. ARC America Corp.*, —— U.S. ——, 109 S.Ct. 1661, 57 U.S.L.W. 4425 (April 18, 1989); See also: "Regulation of Gas Utility Bypass: A Case for Concurrent Jurisdiction," by Herbert J. Martin and Steven J. Gorosh, Exhibit "B" to plaintiff ONG's Brief in Support of Motion For Summary Judgment covering the Pre-emption Issue.

sary for the transmission of natural gas to Powersmith's Firestone Project without first obtaining a franchise from Oklahoma City.[8]

IT IS THEREFORE ORDERED that ONG's motion for summary judgment is sustained and defendants' motions for summary judgment are denied.

Pursuant to 12 O.S. 1981, § 1655, IT IS FURTHER ORDERED that the defendant Williams is enjoined from using any of Oklahoma City's streets, alleys or other public rights-of-way for the purpose of laying pipeline and other equipment for the transport of natural gas and/or transport of natural gas in its existing pipelines that are currently using the public streets of Oklahoma City to the defendant Powersmith's Firestone Project without first obtaining a franchise from the voters of Oklahoma City.

Dated this 19th day of May, 1989.

/s/ David M. Cook
DAVID M. COOK
District Judge

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[8] *Okla. Gas and Electric Co. v. Total Energy, Inc.*, 499 P.2d 917 (Okla. 1972); *Bartlesville Electric Light & Power Co. v. Bartlesville Interurban Ry. Co.*, 26 Okla., 453, 109 P. 228 (1910).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
OKLAHOMA CITY, OKLAHOMA

No. CIV-89-519-A

WILLIAMS NATURAL GAS COMPANY,
Plaintiff(s),

vs.

THE CITY OF OKLAHOMA CITY, OKLAHOMA and
OKLAHOMA NATURAL GAS COMPANY,
Defendant(s).

[Filed April 13, 1989]

ENTER ORDER

The Court has been advised that the plaintiff, Williams Natural Gas Company and defendant The City of Oklahoma City, have reached an agreement on the First Cause of Action herein, being the condemnation claim for relief, both such parties having tendered to the Court an agreed order providing for agreed compensation to the City and granting right to immediate possession of the property sought to be condemned to the plaintiff. The agreeing parties acknowledge that entry of such order would permit the construction, but not use, of the proposed pipeline herein, and that use thereof, that is the transportation of natural gas through it, would remain subject to eventual ruling on the merits of the Second

Cause of Action concerning Oklahoma Natural Gas Company's franchise and issues related thereo.

The Court will consider entering the proposed agreed Order only after giving the remaining defendant, Oklahoma Natural Gas Company, an opportunity to be heard in its regard and such hearing is set for 9:30, Tuesday, April 18, 1989.

ABOVE ORDER ENTERED BY THE DIRECTION OF JUDGE WAYNE E. ALLEY.

CLERK
By: /s/ Louise R. Gates
Deputy

Copies to parties of record.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-89-519A

WILLIAMS NATURAL GAS COMPANY,
a Delaware corporation,
Plaintiff,

vs.

THE CITY OF OKLAHOMA CITY, OKLAHOMA, a municipal corporation, and OKLAHOMA NATURAL GAS COMPANY, a Delaware corporation,
Defendants.

[Filed April 18, 1989]

ORDER

It appearing to the Court from the Complaint of the plaintiff, Williams Natural Gas Company (Williams), and the Answer of the defendant, City of Oklahoma City, Oklahoma (City), to-wit:

1. That Williams seeks to condemn a permanent easement and right-of-way across but under certain city streets more particularly described in the Complaint for the purpose of laying a pipeline pursuant to a Certificate of Public Convenience and Necessity issued to Williams by the Federal Energy Regulatory Commission (FERC).

2. That City has no defense to the taking sought.

3. That said taking and use shall not interfere with the public use and enjoyment of said streets.

4. That just compensation to the City of the property interests taken is approximately $50,000.00.

5. That Williams has the need for and right to immediate possession of the property sought to be condemned, provided:

(a) Williams shall deposit with the Clerk of this Court the sum of $50,000.00, which sum the City may draw from the Clerk at its pleasure.

(b) Said pipeline shall be constructed in accordance with the ordinances of City insofar as said ordinances pertain to the health and safety of the citizens of City.

IT IS THEREFORE ORDERED by the Court that subject to the conditions enumerated above, Williams is entitled to and is granted immediate possession of the easements sought to be condemned.

IT IS FURTHER ORDERED that the amount of just compensation for property interests taken shall be determined hereafter as provided by law.

s/ Wayne Alley
United States District Judge

APPROVED:

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IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-89-519-A

WILLIAMS NATURAL GAS COMPANY,
a Delaware corporation,
Plaintiff,

v.

THE CITY OF OKLAHOMA CITY, a municipal corporation;
and OKLAHOMA NATURAL GAS COMPANY,
a Delaware corporation,
Defendants.

[Filed May 1, 1989]

ORDER

This matter coming on this 1st day of May, 1989, upon plaintiff's application for an order staying certain proceedings in the District Court of Oklahoma County, Oklahoma in Case No. CJ-88-10553, the parties appearing by counsel, and the Court having heard the argument of counsel and being fully advised, finds:

1. That on April 18, 1989, this Court, over defendant Oklahoma Natural Gas Company's objection, entered its order allowing plaintiff, upon deposit of $50,000, to enter upon the rights-of-way sought to be condemned for the purpose of constructing the pipeline in question; that by issuing said order, this Court first exercised jurisdiction and authority over the easements sought to be condemned.

2. That on April 28, 1989, in said state court proceedings, that Court entered its order enjoining and restraining plaintiff "from using or occupying the public streets or other rights-of-way within Oklahoma City in order to construct or operate the pipeline and related facilities" which are the subject of this action.

3. That the order of the State Court is an interference with this Court's jurisdiction and should be stayed pending determination of the pre-emption issue.

4. The issue of pre-emption having been first presented to the State court, this Court will not proceed to decide that issue in advance of the state court decision on the issue if that be made within a reasonable time.

IT IS THEREFORE ORDERED by the Court, that all proceedings in Case No. CJ-88-10553 in the District Court of Oklahoma County, Oklahoma, restraining plaintiff from entering upon the public streeets and rights-of-way of the City of Oklahoma City for the purpose of constructing the pipeline which is the subject of this action, be, and the same are stayed pending determination of the pre-emption issue.

/s/ Wayne Alley
United States District Judge

APPROVED AS TO FORM:

/s/ William R. Burkett
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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-89-519-A

WILLIAMS NATURAL GAS COMPANY,
a Delaware corporation,
Plaintiff,

v.

THE CITY OF OKLAHOMA CITY, a municipal corporation; and OKLAHOMA NATURAL GAS COMPANY,
a Delaware corporation,
Defendants.

[Filed May 30, 1989]

ORDER

By Order dated 18 April 1989, the Court granted the request of Williams Natural Gas Company (Williams) for the condemnation of certain property in the City of Oklahoma City, Oklahoma and for leave to commence construction of a pipeline on the condemned property. On 1 May 1989, the Court stayed enforcement of a temporary restraining order issued by the Honorable David M. Cook in parallel state proceedings in the district court for Oklahoma County. The state court's temporary restraining order barred Williams' pipeline construction on the property at issue. According to counsel for the parties, the pipeline construction was completed pursuant to the Court's Order.[1]

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[1] As a general matter, condemnation orders under the Natural Gas Act provide for the construction, maintenance, and operation of

During the course of this litigation, the Court has explicitly declined to address the federal preemption question—that is, whether the provisions of the Natural Gas Act (NGA) preempt the Oklahoma franchise requirement as it relates to the transportation of natural gas within the territorial limits of Oklahoma City. The state court reached this question first.

On 19 May 1989, Judge Cook ruled that the provisions of the NGA do not preempt the Oklahoma franchise requirement, noting that a pipeline company's nonfranchised use of city streets and the economic consequences of such use are matters of "legitimate local concern." *Oklahoma Natural Gas Company v. Smith Cogeneration, Inc.*, No. CJ-88-10553, slip op. at 5 (D. Ct. Okla. May 19, 1989). Effectuating his judgment, Judge Cook entered a permanent injunction as to Williams' nonfranchised use of the streets of Oklahoma City:

> Williams is enjoined from using any of Oklahoma City's streets, alleys or other public rights-of-way for the purpose of laying pipeline and other equipment for the transport of natural gas and or transport of natural gas in its existing pipelines that are currently using the public streets of Oklahoma City to the defendant Powersmith's Firestone Project without first obtaining a franchise from the voters of Oklahoma City.

Id. at 5. Williams, not surprisingly, seeks to avoid the state court result.

In conjunction with the intervenor Powersmith Cogeneration, Williams argues that this Court should authorize the operation of the pipeline on the condemned property

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pipelines. *See* 15 U.S.C. § 717f(c), (h). In the instant case, the construction element is now moot; the maintenance element is not an issue; and, as noted subsequently in text, the Court is not situated to address the operation element as qualified by Judge Cook's preemption ruling.

and, if necessary, enjoin the state court proceeding and enforcement of any orders issued therein to permit such operation. The Court need not concur in the wisdom of the state court decision, however, to find that it is barred from addressing the question of pipeline operation by the *Rooker* doctrine. *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923); *see Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng.*, 398 U.S. 281, 295-97 (1970).

The *Rooker* doctrine bars a federal district court from acting as an appellate court for purposes of overriding a state court judgment, "even though the judgment may rest an erroneous resolution of constitutional or federal law issues." *Texaco, Inc. v. Pennzoil*, 784 F.2d 1133, 1142 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987). The Second Circuit in the *Pennzoil* case described the considerations underlying the *Rooker* doctrine as follows:

> The doctrine stems from recognition that (1) state courts are just as obligated and competent as federal courts to decide federal constitutional questions (2) a path is available through the state appellate system to the Supreme Court, and that (3) waste of judicial resources and unnecessary friction between state and federal courts might ensue if a federal district court intervened to overrule a state court decision.

The Court finds each of these considerations to be implicated here and, consequently, the *Rooker* doctrine is controlling.

To support its argument for relief, Williams cites the Tenth Circuit's recent decision in *Seneca-Cayuga Tribe v. Oklahoma ex rel. Thompson*, No. 86-1885 (10th Cir. May 3, 1989). In *Seneca-Cayuga*, the State of Oklahoma sued certain Indian tribes seeking to exercise regulatory authority over Indian operation of bingo games in Indian

country. The state trial court ruled that it lacked subject matter jurisdiction over the controversy. On appeal, the Oklahoma Supreme Court reversed. The court rejected the "strict territorial approach" to defining the boundaries of tribal sovereign immunity in favor of an analysis focusing on federal preemption and the proposed regulation's infringement on tribal self-government. *State ex rel. May v. Seneca-Cayuga Tribe*, 711 P.2d 77, 84 (Okla. 1985). Under this analysis, the Oklahoma Supreme Court concluded that the state court did, in fact, have jurisdiction over the Indian defendants. *Id.* at 91.[2] Subsequently, the Indian litigants commenced an action in federal district court for declaratory and injunctive relief as to the state regulatory efforts. The federal district court declined to abstain at the request of the State of Oklahoma, and proceeded to enjoin the state court proceedings.

Williams' reliance on *Seneca-Cayuga* is misplaced for at least two reasons. First, in *Seneca-Cayuga*, the state

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[2] In reaching this result on the immunity question, the Oklahoma Supreme Court held that federal law did not preempt state regulatory efforts as to the Indian bingo operations. 711 P.2d at 90. Based on this preemption ruling, Williams argues that *Seneca-Cayuga* is on all fours with the instant case. A careful reading of the Tenth Circuit decision, however, suggests otherwise. In *Seneca-Cayuga*, the Tenth Circuit does not appear to have attributed any legal significance to the Oklahoma Supreme Court's preemption ruling. It noted that the Oklahoma Supreme Court's unorthodox approach to the sovereign immunity question, which incorporated the preemption issue as an analytical predicate, had never been employed in federal court and was unlikely to be so employed. *Seneca-Cayuga*, slip. op. at 15 n.7. The *Younger* analysis in *Seneca-Cayuga*, moreover, presumes that a final state court judgment as to the scope of federal preemption over Indian bingo had yet to be entered. *Id.* at 12 (noting the need for a determination as to whether "the federal law has not preempted state authority"). Therefore, the Tenth Circuit addressed only the state court ruling on the sovereign immunity question, without reference to the mode of analysis involving federal preemption. The state court judgment was, therefore, one of jurisdictional significance.

court lacked the jurisdiction to entertain the suit against the Indian tribes, irrespective of the Oklahoma Supreme Court's decision. The parameters of tribal sovereign immunity are defined exclusively by federal law. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978); *Indian Country, U.S.A. v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 829 F.2d 967, 976 (10th Cir. 1987), *cert. den. sub nom. Oklahoma Tax Comm'n v. Muskogee (Creek) Nation*, 108 S.Ct. 2870 (1988). Yet, the Oklahoma Supreme Court purported to hold jurisdiction to be proper employing an analysis that "has never been applied by a federal court to sovereign immunity questions . . . . [and] is unlikely to be so applied." *Seneca-Cayuga*, slip op. at 15 n.7.

The Oklahoma Supreme Court's error is not the material issue here but, rather, its effect. The court's error postulated a jurisdictional footing for the lawsuit that, in fact, never existed. On the other hand, in the instant case, there can be no doubt that the district court for Oklahoma County had subject matter jurisdiction over the preemption question. Williams merely quarrels with the correctness of the state court's ruling on this point of federal substantive law. Under *Rooker* and its progeny, however, this is not a proper subject for inquiry by this Court.

Second, in *Seneca-Cayuga*, all avenues of state appellate review were closed to the adversely affected Indian litigants. The Oklahoma Supreme Court had ruled on the immunity question, albeit erroneously, leaving the Indians with the prospect of enduring unwarranted litigation in the state courts. Conversely, in the instant case, Williams is free to pursue its arguments for avoiding the franchise requirement, including those relating to federal preemption, on appeal in the state system. The concerns underlying the *Rooker* doctrine make readily apparent the desirability and, indeed, necessity for this Court to stay its hand.

Williams' request for authorization to operate its pipeline on the condemned Oklahoma City property and for an injunction as to the parallel state proceedings is accordingly DENIED. The Court does find, however, that its Order today "involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal . . . may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see Lear Siegler, Inc. v. Adkins*, 330 F.2d 595, 598 (9th Cir. 1964). Leave to appeal under section 1292(b) is therefore GRANTED.

It is so ordered this 30th day of May, 1989.

/s/ Wayne E. Alley
WAYNE E. ALLEY
United States District Judge

APPENDIX D

FEDERAL ENERGY REGULATORY COMMISSION

Docket No. CP89-93-000

WILLIAMS NATURAL GAS COMPANY

ORDER ISSUING CERTIFICATE

(Issued February 16, 1989)

Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon, Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

On October 28, 1988, Williams Natural Gas Company (WNG) filed an application, pursuant to section 7(c) of the Natural Gas Act (NGA), for a certificate of public convenience and necessity authorizing it to construct, own and operate a 12.4-mile pipeline and related facilities for the purpose of transporting natural gas to a cogeneration plant being constructed by PowerSmith Cogeneration Project Limited Partnership (PowerSmith) near Oklahoma City, Oklahoma. WNG also requests authorization to implement a newly designed transportation rate, to be used in conjunction with its Rate Schedule ITS rate, for gas transported to the plant. For the reasons discussed herein, we will issue WNG a certificate, subject to conditions, authorizing construction of the pipeline and related facilities and will authorize the use of the combined rate.

Background

PowerSmith [1] is currently constructing a cogeneration plant [2] on the grounds of the Firestone Tire and Rubber Company (Firestone) manufacturing plant located in Oklahoma City, Oklahoma. The estimated completion date of the cogeneration plant is June 9, 1989, at a total estimated cost of $79.6 million.

The plant will be a combined-cycle 106 MW cogeneration plant. Electricity generated by the plant is to be sold to Oklahoma Gas and Electric Company (OG&E) and any steam produced will be sold to Firestone for use in its tire manufacturing operations. Sales agreements have been executed by PowerSmith with both Firestone and OG&E for the respective products of the plant. The power sales agreement between PowerSmith and OG&E has been approved by the Oklahoma Corporation Commission.

Once the plant commences commercial operations, it will rely exclusively on natural gas to generate electricity and steam. PowerSmith has contracted with Ladd Gas Marketing, Inc. (Ladd),[3] to supply the plant's gas requirements under a long-term gas supply contract.[4]

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[1] PowerSmith is a limited partnership consisting of two general partners, ENIGEN, Inc., and Firestone Cogeneration Joint Venture, and four limited partners, Energy National, Inc., Prudential Interfunding Corporation, John Hancock Mutual Life Insurance Company and Hydra-Co.

[2] The cogeneration facility was originally certified as a qualifying cogeneration facility in *Firestone Cogeneration Joint Venture*, 33 FERC ¶ 62,481 (1985), and recertified as a qualifying cogeneration facility in *PowerSmith Cogeneration Project, Limited Partnership*, 42 FERC ¶ 62,121 (1988).

[3] Ladd is a wholly owned subsidiary of Ladd Petroleum Corporation. Ladd Petroleum Corporation is an affiliate of General Electric Company, which will carry out the actual design and construction of the PowerSmith cogeneration plant.

[4] Ladd has contracted with PowerSmith to provide all of the plant's gas requirements for a term of 15 years from the gas commercial operation of the cogeneration plant begins.

PowerSmith, Ladd and WNG have entered into a transportation agreement under which WNG has agreed to transport gas to the plant on an interruptible basis under WNG's section 284.221 blanket transportation certificate.[5] The pipeline and related facilities proposed in the instant application by WNG are to be constructed to transport this gas to the cogeneration plant.

Proposal

WNG seeks a certificate of public convenience and necessity authorizing it to construct, own and operate approximately 12.4 miles of 12-inch diameter natural gas pipeline along with related measuring, regulating and appurtenant facilities to connect its existing pipeline system with the PowerSmith cogeneration facility. The pipeline is to extend from an interconnection with WNG's Cement pipeline in Cleveland County, Oklahoma, to a delivery point at or near the cogeneration plant.[6]

The pipeline and related facilities are expected to cost $2,373,700 which WNG plans to finance with internally generated funds. Ladd is to reimburse WNG for the difference, if any, between the cost of the facilities [7] and the amount of transportation revenues collected by WNG during the first three years of service. The transportation revenues collected by WNG from Ladd for the transportation service, less the GRI surcharge, annual charge adjustment (ACA), fuel and gathering charges, are to be applied towards Ladd's payment of the costs expended

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[5] WNG was issued a Part 284 blanket transportation certificate in *Northwest Central Pipeline Corp.*, 38 FERC ¶ 61,169 (1987).

[6] The interconnection with WNG's Cement pipeline is to be in Section 26, Township 10 North, Range 4 West, in Cleveland County, Oklahoma. The point of delivery to the cogeneration plant is to be in Section 8, Township 11 North, Range 4 West, in Oklahoma County, Oklahoma.

[7] The cost of the facilities is not to exceed $3.3 million.

by WNG for construction of the facilities. The agreement stipulates that three years after initial deliveries, WNG will collect a lump sum payment from Ladd for any remaining out-of-pocket costs (i.e. facility costs in excess of transportation revenues collected).

The agreement has a primary term of 15 years commencing on the date the plant begins commercial operation, which shall be no later than June 1, 1990. The agreement may be extended by mutual agreement of the parties for up to three additional five-year periods. Either WNG or Ladd may terminate the agreement by written notice 180 days prior to the end of the 15-year period or prior to the end of any successive 5-year period.

The agreement provides for the transportation of up to 27,400 Mcf of gas per day to be received at any available receipt point located on WNG's system not upstream of the interconnection between WNG's Cement pipeline and its South-of-Blackwell pipeline and delivered at the plant delivery point. The interruptible transportation service to be provided by WNG will be by backhaul. Under the agreement, Ladd is required to transport 100 percent of PowerSmith's gas requirements on WNG's system as long as WNG has sufficient capacity. WNG estimates that the annual volume of gas transported will be approximately 9,000 Mcf.

WNG proposes to charge Ladd a combination rate for transporting the gas. The rate may vary from time to time but cannot exceed a maximum contractual rate.[8] It will consist of a combination of WNG's Rate Schedule, ITS rate and a proposed rate, designated as the Rate

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[8] The current maximum rate, as set forth in WNG's application, is 17.47 cents per Mcf including GRI and ACA charges but excluding gathering and fuel charges. The maximum rate will vary according to gathering and fuel costs. In the event the maximum contractual rate plus gathering and fuel charges exceeds 27 cents per Mcf, the agreement provides that Ladd and PowerSmith may jointly terminate the agreement.

Schedule X-23 rate. The ITS rate is to be used to reflect the transportation charge for the gas from the points of receipt to the interconnection with the proposed lateral. The X-23 rate is to be designed to reflect the cost of service for transportation through the new lateral. WNG asserts that charging Ladd its ITS rate and the X-23 rate, in conjunction, for the gas transported to PowerSmith will prevent the costs, and consequently the risks associated with the new facilities, from being shifted to any of WNG's other customers. WNG requests that the X-23 rate be a stand-alone rate due to the reimbursement arrangement with Ladd and the omission of the cost of the new facilities from its general system rate base.

Interventions

After due notice by publication in the *Federal Register* on November 7, 1988 (53 Fed. Reg. 45,960), timely unopposed motions to intervene supporting the application were filed by Firestone, PowerSmith and Ladd.[9] A timely motion to intervene opposing the application was filed by Oklahoma Natural Gas (ONG). Answers to ONG's motion to intervene were filed by WNG, PowerSmith and Ladd.

The answer filed by Ladd opposes ONG's motion to intervene in all respects.[10] ONG is a local distribution company serving the area in and around the cogeneration plant. As such, ONG is in direct competition for the business of PowerSmith. Accordingly, we will grant ONG's motion to intervene as it has a substantial interest which will be directly affected by the outcome of this proceeding that cannot be adequately represented by any other party.

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[9] Timely unopposed motions to intervene are granted by operation of Rule 214.

[10] We assume this includes that Ladd opposes the granting of ONG's intervention.

In its intervention opposing the application, ONG contends that (1) the Commission lacks jurisdiction over the proposal, (2) the application fails to provide evidence of adequate gas supply, (3) the Commission must explore alternative proposals, (4) the proposed rate treatment involves discriminatory discounting, and (5) the provision allowing WNG to provide 100% of the transportation service to PowerSmith over the life of the agreement is anticompetitive. ONG asserts that WNG's application should either be dismissed or set for hearing.

WNG, Ladd and PowerSmith counter the arguments raised by ONG in their answers. WNG notes that ONG's assumption that the proposed lateral will be connected to WNG's gathering facilities is inaccurate. WNG further notes that while Ladd has a best efforts obligation under its supply contract to provide gas produced in Oklahoma, its transportation agreement with Ladd and PowerSmith does not preclude the transportation of gas which may be produced outside of Oklahoma. WNG advises that the receipt points listed in Exhibit A of the transportation agreement include receipt points in Kansas and Wyoming and interconnections with other interstate pipelines. WNG also points out that the proposed line interconnects in an area where potential exchanges with Natural Gas Pipeline Company of America could occur. Additionally, WNG states that ONG simply ignores the fact that the gas received by WNG for transportation, even if it originates in Oklahoma, would be commingled in the WNG system and would, at least in part, be distributed to consumers in other states.

WNG, Ladd, and PowerSmith assert that adequacy of gas supply and competitive alternatives should not be issues in the instant proposal as PowerSmith is satisfied that Ladd can live up to its obligation to supply gas and PowerSmith has already determined that an arrangement with ONG would be competitively inferior to that which it has chosen.

ONG filed a supplement to its intervention on January 18, 1989, which it contends is appropriate in light of additional information which it received subsequent to the filing of its motion to intervene.[11] Objections to this supplement were filed by WNG and PowerSmith on January 27 and January 30, 1980, respectively. Both WNG and PowerSmith assert that the supplement filed by ONG is nothing more than an answer to the answers previously filed by them. Thus, WNG & PowerSmith assert that this filing is improper as an answer to an answer under section Rule 213(a)(2) of the Commission's Procedural Rules.

ONG's supplement is dedicated primarily to rebutting the arguments raised by WNG, Ladd, and PowerSmith in their answers to ONG's intervention. Rule 213(a)(2) was designed to prevent this type of filing. Accordingly, we find that ONG's supplement is an improper filing and the arguments raised therein will not be entertained in this order.

Comments to the application were filed by the Oklahoma Corporation Commission (OCC) on February 1, 1989. We will treat this filing as a late motion to intervene. No parties have opposed the filing and allowing the intervention will not delay the proceeding or prejudice the other parties. Further, as the state agency charged with overseeing the regulation of public utilities in the State of Oklahoma, the OCC has a substantial interest in

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[11] This additional information includes (1) a gas sales agreement dated August 7, 1987, between Ladd Petroleum Corp. (seller) and Firestone Cogeneration Joint Venture Limited (buyer); (2) A transportation agreement dated August 7, 1987, between Ladd Petroleum Corp. and Firestone Cogeneration Joint Venture; (3) an option agreement for the transportation of natural gas dated Sept. 30, 1988, among Ladd, PowerSmith and the Williams Companies, Inc. (intrastate pipeline option agreement); and (4) an option agreement for the transportation of natural gas dated Sept. 30, 1988, among Ladd, PowerSmith and Williams Natural Gas Co. (option agreement no. II).

this proceeding which cannot be adequately represented by any other party. Accordingly, the OCC will be made a party in this matter.

The OCC states that on December 9, 1988, ONG filed an application with the OCC for the issuance of a show cause order to WNG regarding whether the activities proposed in the instant application constitute local transportation and distribution of gas which should be regulated by the OCC. The OCC requests that we "(1) defer consideration . . . until the OCC has conducted an evidentiary hearing to ascertain certain facts, (2) conduct a joint hearing with the OCC to ascertain pertinent facts or (3) conduct an evidentiary hearing . . . to determine if facts exist which would support the F.E.R.C. jurisdiction rather than issuing an order without an evidentiary hearing."

Discussion

At the outset, we note that the objections of ONG have raised no issues of material fact in regard to the proposal which require additional inquiry by the Commission. Further, the OCC has failed to set forth any ascertainable factual dispute which warrants delaying or deferring a decision in this matter or which warrants the expenditure of valuable Commission resources in conducting a hearing. We find that sufficient facts upon which to base a decision in this matter are set forth in the filings of the parties. Accordingly, we will deny ONG's and the OCC's requests for hearing in this matter.[12]

Jurisdiction: ONG asserts that the facilities proposed by WNG are subject to local rather than federal regulation as "the proposal, notwithstanding that it is cast as

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[12] ONG filed a motion on February 3, 1989, to compel WNG to respond to a data request. In light of our determination that a hearing is unnecessary in this matter, we will deny this motion.

an application to expand service by an interstate pipeline, in fact relates to service in the nature of distribution or intrastate transportation." [13] In support of this argument, ONG asserts that (1) the gas actually delivered to PowerSmith will originate in Oklahoma, will never be commingled with any other gas stream and will never cross state lines, (2) the facilities will all be constructed in Oklahoma and will be attached to WNG's gathering facilities, and (3) the transaction will affect only parties in Oklahoma.

We find that the facilities proposed by WNG are within the jurisdiction of the Commission. First, we note that ONG's assertion that the proposed lateral will be connected to gathering facilities is incorrect. The proposed lateral is to interconnect with WNG's Cement pipeline. WNG's Cement pipeline is a high-pressure 16-inch line capable of transporting large volumes of gas. Its primary function is to transport gas that has been gathered from various fields in western Oklahoma to WNG's interstate system for transmission to points both in and out of Oklahoma. It is clearly part of WNG's integrated interstate pipeline system and, as such, does not qualify as a gathering facility.

Second, the proposed facilities are not exempt from Commission jurisdiction as local distribution facilities. In determining what constitutes local distribution, we have previously stated,

> the term "local distribution of gas" connotes a network of small local lines that transmit the gas from large interstate pipelines to individual consumers spread about in a local geographic area. This is also consistent with how the term has been applied by the Commission and industry for many years . . . . Furthermore, the legislative history of section 1(b) [of the NGA] suggests that Congress did not intend

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[13] Motion of ONG at p. 8.

> to create a definition of local distribution that would apply to the tie-in facilities that connect an interstate pipeline to an end-user. (Footnote omitted.)[14]

In the same vein, we find that the facilities proposed by WNG in this case bear little resemblance to a local distribution system. The proposed lateral will tie WNG's interstate system directly to an end-user—PowerSmith. The lateral will be an essential and integral element of the interstate transportation of natural gas.[15] Further, we recently determined in *Panhandle Eastern Pipe Line Co.*, 42 FERC ¶ 61,076 (1988), that the transportation of gas directly to an end-user by an interstate gas pipeline did not involve local distribution. In rejecting the assertion by a local distribution company that the transaction involved local distribution, we stated that "irrespective of any local effects resulting from the by-pass, we believe that the transportation service at issue here essentially concerns federal interests, that is, those embodied in developing interstate transportation policy that provides consumers with a variety of supply options by promoting a competitively priced spot market for natural

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[14] *Mojave Pipeline Co.*, 42 FERC ¶ 61,351, at p. 62,001 (1988). This determination was based on Supreme Court determinations of what constitutes local distribution in *FPC v. East Ohio Gas Co.*, 338 U.S. 464 (1950) and *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329 (1951).

[15] The fact that the molecules of gas actually delivered to PowerSmith will originate in Oklahoma does not alter our view. The transportation will be effected through the use of interstate pipeline facilities. Moreover, the transportation will be carried out by means of a backhaul arrangement that calls for gas to be delivered to WNG at a number of designated receipt points (some in Kansas and Wyoming) and commingled with the interstate stream of gas in WNG's system. We find that this is not a transaction that can be effectively regulated by the State of Oklahoma. *See, e.g., Columbia Gas Transmission Corp.*, 10 FERC ¶ 61,111 (1980) (certificating transportation by an interstate pipeline where the gas originated and was consumed within the same state.)

gas." Accordingly, we find that the instant proposal does not involve local distribution.

In sum, we find that the facilities proposed by WNG will involve an expansion of WNG's interstate pipeline system which is used to transport gas in interstate commerce. Accordingly, the facilities WNG proposes to construct in its application are subject to the Commission's jurisdiction and to the requirements of subsections (c) and (e) of section 7 of the NGA.

Gas Supply: ONG contends that the failure of WNG's application to set forth any information in regard to Ladd's available gas supply is a serious omission. Under the circumstances of this case, we do not agree. In the first place, there is no question in this case that the proposal is based on a real transaction. PowerSmith has contracted directly with Ladd to purchase gas. Moreover, the sale by Ladd is not subject to our jurisdiction under the NGA. Further, WNG does not propose to place the cost of the new facilities into its general rate base. Under this arrangement, WNG's other customers will bear no portion of the costs of the facilities and are protected from the risk that the project may fail. If Ladd should fail in its obligations to PowerSmith, PowerSmith has the protection of its contract with Ladd. Under such circumstances, we find that specific evidence on the amount of supplies available for Ladd to meet its contract is unnecessary.

Alternative Proposals: ONG contends that before the Commission can determine if WNG's proposal is in the public interest, it must first consider and compare ONG as an alternative supplier. ONG states that it has been unable to determine why PowerSmith chose not to deal with it rather than Ladd. In this regard, ONG hints that there may have been improper dealings between the parties leading up to the agreement due to the affiliate relationship between Ladd and General Electric Company (GE), which has been engaged to design and construct

the plant. Relying on Order No. 497,[16] ONG asserts that a hearing is required to investigate this possible improper activity.

ONG's reliance on Order No. 497 is misplaced under the circumstances of this proposal. Order No. 497 was designed to prevent preferential treatment of an affiliated gas marketer by an interstate pipeline in the transportation of natural gas. Order No. 497 is inapplicable in the instant case. GE is not an interstate pipeline and Ladd is not affiliated with WNG. GE is designing and constructing the PowerSmith facilities and is providing the gas turbines to be used in the plant. We fail to see how such a relationship could equate into improper anticompetitive activity in the instant case and ONG has failed to point out any specific abuse. Without more, we see no reason to expend Commission resources investigating this improbable allegation.

We also conclude that it is unnecessary at this stage to compare service available to PowerSmith through ONG with the service which PowerSmith has already chosen. We assume PowerSmith has carefully analyzed the various gas supply alternatives available to it, including service through ONG. The nature of the cogeneration plant's operations carries with it a built-in incentive for PowerSmith to acquire a long-term reliable supply of gas at the lowest possible price. PowerSmith has determined that the Ladd-WNG alternative is the superior alternative for its needs. Absent some showing of unfair, deceptive or discriminatory practice, of which we may take cognizance, we see no reason to deny this certificate which is necessary to enable PowerSmith to purchase gas in the market.

Transportation Requirement: Section 10 of the transportation agreement requires Ladd to transport 100 per-

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[16] *Inquiry into Alleged Anticompetitive Practices Relating to Marketing Affiliates of Interstate Pipelines*, Order No. 497, *FERC Statutes and Regulations* ¶ 30,820 (1988).

cent of PowerSmith's gas requirements on WNG's system unless WNG is unable to transport all of the necessary gas or unless PowerSmith and Ladd jointly agree to terminate the agreement if the cost of transportation exceeds 27 cents per Mcf. ONG argues that this provision is anticompetitive and contrary to current Commission policy on open access.

We find that this sole-transporter provision conflicts with our objective of creating a competitive natural gas market as promulgated in Order Nos. 380 [*FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,571] and 436 [*FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,665]. We have previously stated that

> Tariff provisions which deprive customers of the necessary flexibility to take advantage of price competition in order to operate as effectively as possible are clearly contrary to the Commission's stated purpose on competition.[17]

The sole-transporter provision in WNG's transportation agreement would require Ladd to transport 100 percent of PowerSmith's requirements over WNG's system for 15 years. This provision is anticompetitive on its face as it effectively denies Ladd the opportunity to utilize more economical transportation service should such service develop and, consequently, hinders the development of alternatives. Further, we see no justification for such inflexibility when WNG will recover the cost of the pipeline and related facilities through transportation charges and a possible lump-sum reimbursement from Ladd within three years of commencement of service. Accordingly, the certificate authorization granted to WNG will be conditioned on the removal of this provision.

Public Convenience and Necessity: Authorizing WNG to construct the lateral and related facilities necessary

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[17] *Panhandle Eastern Pipe Line Co.*, 38 FERC ¶ 61,164, at p. 61,469 (1987) (eliminating a sole-supplier provision from a direct sale agreement).

to transport gas to PowerSmith will result in benefits to Ladd, WNG, PowerSmith, Firestone and OG&E. Ladd and WNG will both benefit from incresed revenues from their respective gas sales and transportation services that they will provide to Powersmith. PowerSmith will benefit by having access to competitively priced gas through Ladd. This will in turn benefit both OG&E and Firestone as OG&E will have a new source of reasonably priced electricity and Firestone will be able to operate its tire manufacturing processes more efficiently by using the steam produced by PowerSmith. WNG's customers will also benefit as they will obtain the benefit of increased throughput on WNG's currently under-utilized system. Further, operation of the cogeneration plant will help bolster Oklahoma's economy benefitting the residents of the state.

We realize that authorizing the constructon of the lateral will result in the gas being transported by WNG directly to an end-user located in ONG's distribution area. However, we are reluctant to shield local distribution companies from the forces of competition which we have attempted to foster in the natural gas industry. This is especially true in light of the facts in the instant case. ONG has been unsuccessful in its attempt to compete for a new customer. However, in the absence of any evidence of unfair competition, we see no reason to depart from our belief that the public interest is best served by allowing the market to determine who will provide service in cases such as this. Accordingly, we find that it is in the present and future public convenience and necessity to authorize WNG to construct the 12.4-mile lateral and related facilities to transport gas to PowerSmith.

Rate Treatment: WNG proposes to charge Ladd a combined transportation rate consisting of the proposed X-23 rate, which is designed to recover the cost of service associated with the proposed facilities, and WNG's

ITS transportation rate. WNG proposes to discount its ITS rate to Ladd, if necessary, to ensure that the overall rate does not exceed the maximum contractual rate. In the event the maximum contractual rate plus gathering and fuel charges exceeds 27 cents per Mcf, the agreement allows Ladd and PowerSmith jointly to terminate the agreement.

ONG asserts that allowing WNG to discount its ITS rate rather than the X-23 rate would result in discriminatory discounting which might detrimentally affect WNG's other customers. This contention ignores the fact that WNG has already been authorized to discount selectively under Part 284 of our regulations. Specifically, section 284.7(d)(5) allows pipelines transporting under a blanket certificate or under the self-implementing provisions of Subpart B to offer selective discounts between a maximum and minimum rate. WNG, which transports under a blanket certificate, has such rates on file. They were approved in Docket No. RP86-32-006.[18] Of course, even though WNG is authorized to offer discounts selectively, it may not discriminate unduly. Should any of WNG's customers perceive that WNG is offering discounts in an unduly discriminatory manner, it may file a complaint with the Commission.

In this case, ONG's allegations do not indicate that the discount proposed by WNG is unduly discriminatory. ONG does not suggest, for instance, that WNG is unwilling to offer a similar discount to ONG. Rather, ONG's claim is that the discount will result in competition that will be detrimental to ONG. However, our reason for allowing such discounts in the first place is to encourage competition. Thus, WNG's proposal to discount its ITS rate, if necessary, is consistent with our regulations.

The methodology employed by WNG to design the proposed incremental X-23 rate, in combination with its dis-

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[18] *Williams Natural Gas Co.*, 43 FERC ¶ 61,227 (May 5, 1988).

counted ITS rate, is appropriate. Thus, we will authorize WNG to charge the combined X-23 rate and ITS rate for the transportation service to be performed for Ladd. The X-23 rate will be separately stated from WNG's ITS rate and the ultimate level of the X-23 rate will be conditioned on the determination in WNG's pending general rate case in Docket No. RP87-33-000.

The requirement that Ladd reimburse WNG for its out-of-pocket facility costs through the separately stated X-23 revenues recovered during the first three years of operation and to make a lump-sum payment for the unpaid balance at the end of that period could result in double recovery if WNG is permitted to continue charging the X-23 rate after the lump-sum payment is made. The X-23 rate is designed to recover the out-of-pocket cost of the PowerSmith lateral over a normal depreciation schedule based on the economic life of the facilities utilizing WNG's currently effective depreciation rate of 2.8 percent. However, under the lump-sum payment provision, the cost of the facilities would be fully recovered after three years and there would be no justification for WNG to continue to collect a return on and of its investment through the X-23 rate beyond that time. Thereafter, WNG would be entitled to recover only its operating costs associatetd with the lateral which are 0.73 cent per Mcf. Therefore, we will authorize the lump-sum payment but limit the X-23 rate to 0.73 cent per Mcf after the lump-sum payment is made unless WNG files to change the rate.

A review of the environmental assessment prepared to evaluate the environmental impact of the proposed construction indicates that it will not constitute a major federal action significantly affecting the quality of the human environment.

At a hearing held on February 15, 1989, the Commission on its own motion received and made a part of the record in this proceeding all evidence, including the

application and exhibits thereto, submitted in support of the authorization sought herein, and upon consideration of the record.

The Commission orders:

(A) A certificate of public convenience and necessity is issued to WNG authorizing the construction and operation of a 12.4-mile pipeline and related facilities as described in this order and as more fully described in the application.

(B) WNG is authorized to charge a composite transportation rate consisting of an X-23 rate for transportation on the 12.4-mile pipeline authorized in paragraph (A) and WNG's ITS rate for transportation on WNG's main system. The ultimate level of the X-23 incremental rate is conditioned on the determination in Docket No. RP87-33-000.

(C) The certificate issued in paragraph (A) is conditioned on the removal of the sole-transporter provision contained in section 10 of the transportation agreement.

(D) The X-23 revenues are the only portion of the composite rate to be applied toward recovering the cost of the proposed facilities. The X-23 rate is limited to 0.73 cent per Mcf for continued service after the lump-sum payment is made unless WNG files to change the rate.

(E) The certificate issued in paragraph (A) is conditioned on WNG's compliance with Part 154 and paragraphs (a), (c)(3), (c)(4), (e), and (g) of section 157.20 of the Commission's regulations.

(F) The facilities shall be completed and placed in actual operation, as provided by paragraph (b) of section 157.20 of the Commission's regulations, within six months of the date of this order.

(G) The late intervention of the Oklahoma Corporation Commission is granted.

FEDERAL ENERGY REGULATORY COMMISSION

Docket No. CP89-93-001

WILLIAMS NATURAL GAS COMPANY

ORDER DENYING REHEARING AND CLARIFYING PRIOR ORDER

(Issued May 31, 1989)

Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon, Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

On February 16, 1989, the Commission issued an order in Docket No. CP89-93-000 [1] authorizing Williams Natural Gas Company (WNG) to construct and operate a 12.4-mile gas pipeline lateral and related facilities to transport gas to a cogeneration plant being constructed by PowerSmith Cogeneration Project Limited Partnership (PowerSmith). Oklahoma Natural Gas Company (ONG) and WNG each filed a timely request for rehearing of that order. Contemporaneously with its request for rehearing, ONG filed a motion for stay of the February 16 order. ONG's motion for stay was subsequently denied by a Commission order issued March 31, 1989.[2]

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[1] *Williams Natural Gas Co.*, 46 FERC ¶ 61,160 (1989).

[2] *Williams Natural Gas Co.*, Order Granting Rehearing for Further Consideration and Denying Motion for Stay, 46 FERC ¶ 61,408 (1989).

For the reasons discussed herein, we will deny both ONG's and WNG's requests for rehearing. We will, however, clarify that portion of the order concerning the rate treatment of the proposal.

Background

The PowerSmith plant is being constructed by PowerSmith in Oklahoma City, Oklahoma. The plant is to be located adjacent to a tire manufacturing plant owned by Firestone Tire and Rubber Company (Firestone). The steam and electricity produced by the cogeneration facility are to be sold to Firestone and Oklahoma Gas and Electric Company (OG&E), respectively.

Gas is to be supplied to PowerSmith by Ladd Gas Marketing under a 15-year primary term contract and transported by WNG under its section 284.221 blanket transportation certificate. Pursuant to a transportation agreement between WNG, PowerSmith and Ladd, WNG is to transport up to 27,400 Mcf of gas per day on an interruptible basis from any available receipt point on WNG's system not upstream of the interconnection between WNG's Cement pipeline and its South-of-Blackwell pipeline, and delivered at the plant delivery point. The agreement contained a sole-transporter clause which required Ladd to transport 100 percent of PowerSmith's gas requirements on WNG's system as long as WNG has sufficient capacity.

The lateral is to extend from an interconnection with WNG's Cement pipeline in Cleveland County, Oklahoma, to a delivery point at or near the PowerSmith plant. Total cost of the lateral and related facilities is expected to be $2,373,700, which WNG plans to finance with internal funds. Ladd is to reimburse WNG for the difference, if any, between the cost of the facilities, not to exceed $3.3 million, and the amount of transportation revenues collected by WNG during the first three years

of service. The transportation revenues collected by WNG from Ladd for the transportation service are to be applied toward Ladd's payment of the costs expended by WNG for construction of the facilities. Three years after initial deliveries, WNG will collect from Ladd a lump-sum payment for any remaining out-of-pocket costs.

ONG filed an intervention opposing the proposal. The February 16, 1989 order rejected the majority of ONG's arguments and found that the proposal was in the public convenience and necessity. Thus, the order issued WNG a certificate authorizing the construction and operation of the lateral and authorizing WNG to charge the combined rate for transportation service for Ladd to PowerSmith. The Commission found merit in ONG's assertion that the sole-transporter provision was anticompetitive. The order conditioned the certificate on the removal of the sole-transporter provision from the agreement and limited the Rate Schedule X-23 rate to .73 cents per Mcf after the lump-sum payment was made after three years of service, unless WNG filed thereafter to change the rate. This rate limitation was imposed to prevent double recovery by WNG of the fixed costs of the facilities after the lump-sum payment.

On May 5, 1989, PowerSmith filed a letter, with attachments, explaining the status of a proceeding filed in Oklahoma State Court by ONG against WNG, PowerSmith, and Ladd in which ONG is seeking to enjoin construction of the pipeline lateral and transportation service to PowerSmith under an Oklahoma franchise law.[3] The letter also indicates that WNG has filed suit in the United States District Court for the Western District of Oklahoma seeking to condemn, pursuant to section 7(h) of the NGA, rights-of-way in Oklahoma City for the

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[3] *Oklahoma Natural Gas Co. v. Smith Cogeneration Inc. et al.*, Case No. CJ-88-10553 (D. Ct. Okla. County).

lateral and to quiet title to the rights-of-way against ONG's assertion under the franchise law.[4]

ONG filed a letter with the Commission on May 15, 1989, objecting to the letter as an improper answer to a request for rehearing under the Commission's procedural rules.

We find that the letter and attachments submitted by PowerSmith is not an answer to ONG's request for rehearing. It merely contains information regarding the status of cases related to this proceeding presently pending in state and federal courts in Oklahoma. None of the information contained therein has any bearing on our determination in this proceeding as to whether WNG's proposal is required by the public convenience and necessity. Accordingly, while informative, this information has not been considered in our resolution of the rehearing requests.[5]

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[4] *Williams Natural Gas Co. v. The City of Oklahoma City et al.*, No. CIV-89-519-A (W.D. Okla.).

[5] On May 19, 1989, the Oklahoma District Court issued a declaratory judgment in Case No. CJ-88-10553 in which it upheld an injunction stopping WNG from using the streets, alleys or other public rights-of-way for laying pipeline necessary to transport gas to PowerSmith without first obtaining a franchise from the voters of Oklahoma City. The court based its determination on the decision in *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Ser. Comm'n.*, 341 U.S. 329 (1951). The state court determined that the transportation of natural gas to PowerSmith, like direct sales to end-users, is a matter of legitimate local concern subject to the franchise law and not preempted by the NGA.

It is our view that the state court's determination is erroneous. Under section 1(b) of the NGA, the Commission has plenary regulatory authority over all interstate transportation of natural gas. The direct transportation service to be provided by WNG to PowerSmith through the high pressure lateral involves interstate transportation and at no point becomes local distribution. Therefore, the Commission has exclusive jurisdiction over the proposal. *See* Panhandle Eastern Pipe Line Co., 42 FERC ¶ 61,076, at pp. 61,348-9 (1988), appealed *sub nom., Michigan Consolidated Gas Co.*, No. 88-

ONG's Request for Rehearing

ONG argues that the Commission erred in the following respects in authorizing WNG to construct and operate the lateral:

(1) By failing to find that the facilities to be constructed and the transportation service to be provided are within the jurisdiction of the OCC rather than the Commission as (1) all gas to be used in the transactions will be produced, transported, and consumed in Oklahoma, (2) the Cement pipeline from which the lateral is to extend is a gathering facility, and (3) the transportation to PowerSmith involves local distribution.

(2) By determining that the Cement pipeline was an interstate pipeline without holding an evidentiary hearing as such a determination involved a material issue of fact.

(3) By finding that the proposal was in the public convenience and necessity.

(4) By failing to set the matter for hearing.

(5) By failing to defer to the request of the OCC to hold hearings to determine the jurisdictional questions involved and to resolve other factual matters.

(6) By failing to investigate issues raised by ONG and by failing to obtain pertinent information concerning the transaction available only to the WNG, Ladd and PowerSmith.

(7) By failing to require WNG to respond to data requests submitted by ONG.

1062 (D.C .Cir.). We note also that the issue of whether Commission certificate authority preempts state authority is on appeal in *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, No. 88-1650 (6th Cir.).

(8) By failing to find that there is a better alternative to the proposal—namely service by ONG.

(9) By finding that a showing of adequate gas supply by Ladd was not required under the facts of the instant proposal.

(10) By failing to follow established policy in regard to protecting LDC's without adequate explanation.

(11) By protecting private, rather than public, interests.

We discussed and rejected each of these arguments in our February 16, 1989 order. Except for the following comments in regard to several of these issues, we see no reason to expand further on the determinations which were made in that order.

The Cement Pipeline: We determined in our February 16 order that the Cement pipeline is not a gathering line and that an evidentiary hearing was not required to make that determination. However, we failed to note that the Cement pipeline was certificated as a jurisdictional facility in *Cities Service Gas Co.*, Docket No. G-898, 6 FPC 270 (1947). Abandonment authorization has never been sought for this pipeline under section 7(b). Accordingly, we find that our determination that the Cement pipeline is an interstate pipeline was reasonable and that a hearing was not required to make this determination.

Public Convenience and Necessity: ONG contends that our determination that the proposal was in the public convenience and necessity was erroneous as there was no evidence to support our conclusions that the proposal would (1) benefit WNG and Ladd through increased revenues, (2) benefit PowerSmith through having access to competitively priced gas through Ladd, (3) benefit OG&E as OG&E would have a new source of reasonably priced electricity through PowerSmith, (4) benefit Fire-

stone as it would be able to operate its tire manufacturing processes more efficiently through steam produced by PowerSmith, (5) benefit WGN's customers due to increased throughput on WNG's system, and (6) bolster Oklahoma's economy.

We find this argument to be without merit. First, we believe that we can safely assume, as pointed out by ONG, that "[t]he benefits to PowerSmith, Ladd and Williams [WNG] are evident." [6] This leaves our finding of benefits to OG&E, WNG's customers, Firestone and the State of Oklahoma to be explained.

ONG argues that there was no showing that OG&E would purchase power from PowerSmith at any savings to OG&E. ONG states that "[t]here is no evidence in this record to show what price will be paid or what "savings" there will be to OG&E and its consumers." [7] We did not contend in our February 16 order that the PowerSmith plant would result in savings to OG&E or its customers. We merely stated that upon its completion, "OG&E will have a new source of reasonably priced electricity. . . ." [8] Under the Public Utility Regulatory Act of 1978, OG&E need not purchase electricity generated by PowerSmith if PowerSmith's rate exceeds OG&E's avoided costs.[9] Therefore, we find that our conclusion regarding OG&E was proper as OG&E will have the benefit of additional supplies of electricity available from PowerSmith but need not purchase the electricity unless PowerSmith's rates meet this requirement.

No more evidence is required to determine that the increased volumes over WNG's system due to the transportation for Ladd will benefit WNG's other customers.

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[6] Request for rehearing of ONG at p. 9.

[7] *Id* at p. 7.

[8] 46 FERC ¶ 61,160, at pp. 61,560-61.

[9] *See* 18 C.F.R. § 292.304(a)(2).

The combined rate allowed under WNG's proposal assures that no other customers will bear the cost of the new lateral and related facilities. The increased throughput on WNG's system up to the interconnection with the lateral will spread WNG's fixed costs over more volumes resulting in lower overall WNG system costs, which will ultimately be reflected in WNG's rates.

We also feel that no more evidence is necessary to determine that the cogeneration plant will be beneficial to Firestone. Firestone intervened in the original proceeding in support of the proposal and is allowing construction of the plant on its property. In fact, previous to PowerSmith's plans to construct the plant, Firestone had certified the same type of facility as a qualifying cogeneration facility in *Firestone Cogeneration Joint Venture*, 33 FERC ¶ 62,481 (1985). The only reasons evident as to why Firestone desires the construction of a cogeneration plant is to benefit from reduced operating costs and increased efficiency through purchasing steam produced by the plant.

Further, from the evidence presented, we find that it was reasonable to conclude that the proposal would benefit the residents of Oklahoma. Clearly, the construction and operation of the cogeneration plant will bring more jobs and increased revenues to the State. Further, Firestone stated in its original intervention that the proposal would help it remain more competitive in the tire manufacturing industry. ONG offers nothing substantial in contradiction of these conclusions.

Finally, ONG contends that the plant would still be constructed even if WNG was not authorized to construct the lateral to serve PowerSmith as PowerSmith would then have merely purchased gas from ONG. However, locking PowerSmith into gas supplied from ONG would not coincide with our policy of giving gas consumers greater gas supply alternatives in the absence of some showing of unfair competition.

ONG contends that our decision totally ignores the detriment imposed upon ONG and its customers throughout the state due to the bypass of its system by WNG. ONG contends that it will lose Firestone as a customer and will lose the benefit of supplying PowerSmith, the result being that its customers rates will increase due to its fixed costs being spread over less gas volumes.

ONG has lost an opportunity to serve a new customer —PowerSmith. While ONG and its customers will not realize the benefits of serving this customer, ONG will be no worse off as it has never served PowerSmith. Further, ONG has not presented any evidence that the proposal will result in ONG's claimed loss of gas sales to Firestone. We find that ONG's allegation of losing gas sales to Firestone is merely speculative.

For these reasons, we find that there was sufficient evidence presented to conclude that WNG's proposal was required by the public convenience and necessity.

Bypass Policy: ONG contends that we departed without adequate justification from our policy of protecting LDC's from bypass where an LDC is able to provide the service. As pointed out by ONG in its request for rehearing, "[t]he Commission recently has chosen in its orders permitting bypass, to ignore the impact of any particular bypass on the distribution company, which, by law, must continue to serve all customers in its franchise area at rates regulated by the state commission, as well as on the public served by that company." [10] While ONG's account is not entirely complete,[11] it correctly recognizes that our bypass policy has evolved and no longer shows

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[10] ONG's request for rehearing at p. 11.

[11] ONG fails to note that we will not permit bypass where there is evidence of anticompetitive or discriminatory behavior on the part of the interstate pipeline. *See Panhandle Eastern Pipe Line Co.*, 29 FERC ¶ 61,338 (1984), at p. 61,709, and cases cited therein.

a preference for LDC's. In our February 16 order, we stated that

> We realize that authorizing the construction of the lateral will result in the gas being transported directly to an end-user located in ONG's distribution area. However, we are reluctant to shield local distribution companies from the forces of competition which we have attempted to foster in the natural gas industry. This is especially true in light of the facts in the instant case. ONG has been unsuccessful in its attempts to compete for a new customer. However, in the absence of any evidence of unfair competition, we see no reason to depart from our belief that the public interest is best served by allowing the market to determine who will provide service in cases such as this.

Subsequent to our February 16 order in the instant case, we further clarified our new bypass policy and our reasons for it in *Williams Natural Gas Co., et al.*, 47 FERC ¶ 61,080 (1989). In that order we stated that

> In the past, we have indicated a preference for industrial customers by LDCs where LDCs were capable of providing the service. [Footnote omitted.] Circumstances in the industry have changed, however. With the phased deregulation of wellhead prices has come a greater reliance on competition and market forces to ensure adequate supplies of gas will be available to consumers at the lowest reasonable cost. Accordingly, we allowed the bypass of LDCs by interstate pipelines in recent cases where there were no indications that the proposed service was the result of any discriminatory behavior. These decisions have been based upon a belief that on a national level, natural gas consumers are better served by a competitive natural gas market which encourages improved services at lower costs. [Footnote omitted.]

> Our current policy is to encourage access between willing buyers and sellers of natural gas in an atmosphere of fair competition. The goal of this policy is to provide incentives that allow all shippers, including LDCs, to benefit from the competitive wellhead market created by the Natural Gas Policy Act of 1978. Under this policy, LDCs are not sheltered from competition any more than other segments of the market. Instead, they are encouraged to choose from a variety of sources of competitively priced gas in order to keep their retail prices competitive. Thus, in the absence of some evidence of unfair competition (*e.g.*, price squeeze or undue discrimination), we are disposed to allow freely negotiated transactions to go forward, even where to do so results in the bypass of a local distributor.

As there was no showing in the instant case of anticompetitive or unduly discriminatory behavior, we find that there was sufficient justification under this new policy to allow WNG to serve PowerSmith in ONG's distribution area.

ONG asserts several arguments not addressed in our February 16 order. First, ONG contends that we erred by not deferring our determination on WNG's proposal until the Oklahoma State Court proceeding initiated by ONG under the Oklahoma franchise law is determined. We find no merit to this argument. As previously indicated, a determination by the state court as to whether or not WNG requires authorization under the franchise law to install the pipeline in Oklahoma City has no bearing on our determination of whether the lateral is in the public convenience and necessity. Should the state court determine that WNG needs authorization under the franchise law, the issue will be whether or not that determination is preempted by our certificate authorization.

Second, ONG asserts that we erred by failing to determine whether the intent of WNG is to ultimately

transfer the lateral to PowerSmith or Ladd and why the parties entered into option agreements providing for alternate construction plans of an intrastate nature after WNG's application was filed. We find these arguments unpersuasive. In order for WNG to transfer the lateral to either Ladd or PowerSmith, it would first have to obtain abandonment authorization under section 7(b) of the NGA. Any issues relating to the transfer would be determined in that proceeding. As for the subsequent intrastate option agreements, these alternatives are immaterial to a determination in the instant proposal.

Third, ONG asserts that we failed to follow Commission policy of denying flexible receipt point authority to interstate pipelines seeking to transport gas in section 7(c) proceedings.[12] ONG relies on our decisions in *Southern Natural Gas Co.*, 36 FERC ¶ 61,275 (1986), and in *Arkla Energy Resources*, 45 FERC ¶ 61,375 (1988), and cases cited therein. ONG's attempted reliance on these decisions is misplaced under the facts in the instant case. In those cases, the applicants sought specific section 7(c) transportation authorization and flexible receipt point authority. WNG does not seek authorization to transport gas in the instant case. Rather, WNG is seeking authorization to construct the lateral so that it can transport gas to PowerSmith under WNG's section 284.221 blanket transportation certificate. One of the benefits of the blanket certificate is that it carries with it flexible receipt point authority.

Finally, ONG asserts that we erred by protecting the private interests of WNG, PowerSmith and Ladd, as opposed to the public interest in allowing the bypass. For the reasons discussed above concerning bypass, we find that the public interest is best served by allowing this

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[12] ONG originally asserted this argument in a supplement to its intervention and protest filed in CP89-93-000. We found this supplement to be an improper filing under Rule 213(a)(2) and therefore did not entertain the arguments raised therein.

competitive arrangement to go forward rather than by forcing PowerSmith to obtain its required gas from a single LDC.

For the above reasons, ONG's request for rehearing is denied.

WNG's Request for Rehearing

WNG disagrees only with our determination that the Rate Schedule X-23 rate be limited to .73 cent per Mcf after the lump-sum payment is made. WNG asserts that the Commission erroneously concluded that WNG would fully recover the costs of the facilities after the lump-sum payment is made after three years of service and, therefore, erred in limiting the X-23 transportation rate to .73 cent at that time.

We agree that WNG should be allowed to recover its out-of-pocket facility costs for the lateral through transportation revenues collected from Ladd through the Rate Schedule X-23 rate. Our reason for limiting the X-23 rate after the lump-sum payment is made to .73 cents per Mcf is to prevent WNG from any double recovery in the event the payment completely covers the cost of the facilities. In the event the payment does not fully recover WNG's costs of the lateral, it will be necessary for WNG to file under section 4 at the time as it is not possible to set that rate at this time. Our February 16 order took this possibility into consideration by stating that the X-23 rate would be limited to .73 cent unless WNG filed to change the rate after the lump-sum payment is made. Therefore, WNG's request for rehearing is denied.

The Commission orders:

The requests for rehearing filed by ONG and WNG in Docket No. CP89-93-000 are denied.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 89-6209, 89-6227, 89-6228

WILLIAMS NATURAL GAS COMPANY, a Utah corporation,
Plaintiff-Appellant,

SMITH COGENERATION, INC., an Oklahoma corporation;
POWERSMITH COGENERATION PROJECT,
a limited partnership,
Plaintiff-intervenor-Appellant,

v.

THE CITY OF OKLAHOMA CITY, a municipal corporation;
OKLAHOMA NATURAL GAS COMPANY,
a Delaware corporation,
Defendant-Appellee.

ORDER

Filed December 27, 1989

Before McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, Circuit Judges.

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc in the captioned cases.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all the judges of the court in regular active service. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Judge Holloway did not participate in consideration of the petition.

Entered for the Court

ROBERT L. HOECKER
Clerk

/s/ Patrick Fisher
By PATRICK FISHER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 89-6209, 89-6227, 89-6228

WILLIAMS NATURAL GAS COMPANY, a Utah corporation,
Plaintiff-Appellant,

SMITH COGENERATION, INC., an Oklahoma corporation;
POWERSMITH COGENERATION PROJECT,
a limited partnership,
Plaintiff-intervenor-Appellant,

v.

THE CITY OF OKLAHOMA CITY, a municipal corporation;
OKLAHOMA NATURAL GAS COMPANY,
a Delaware corporation,
Defendant-Appellee.

ORDER

Filed January 5, 1990

Before McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, Circuit Judges.

The Court, in order to correct a clerical error in the issuance of this order on December 27, 1989, hereby reissues it in order to reflect that Judge Ebel did not participate in the issuance of the order.

The order reissued nunc pro tunc with the above list of judges, and reads as follows:

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing en banc in the captioned cases.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all the judges of the court in regular active service. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Judges Holloway and Ebel did not participate in the issuance of the order.

Entered for the Court

ROBERT L. HOECKER
Clerk

/s/ Patrick Fisher
By PATRICK FISHER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 89-6209, 89-6227, 89-6228

WILLIAMS NATURAL GAS COMPANY, a Utah corporation,
Plaintiff-Appellant,

SMITH COGENERATION, INC., an Oklahoma corporation;
POWERSMITH COGENERATION PROJECT,
a limited partnership,
Plaintiff-intervenor-Appellant,

v.

THE CITY OF OKLAHOMA CITY, a municipal corporation;
OKLAHOMA NATURAL GAS COMPANY,
a Delaware corporation,
Defendant-Appellee.

ORDER

Filed January 12, 1990

Before McKAY, LOGAN and BRORBY, Circuit Judges.

This matter comes on for consideration of appellees' motion for a stay of mandate pending application to the Supreme Court for writ of certiorari.

Upon consideration whereof, it is ordered that issuance of the mandate in the captioned appeal is stayed until

February 12, 1990, and that if on or before that date there is filed with the Clerk of this Court a notice from the Clerk o[f] the Supreme Court that appellant has filed a timely petition for the writ in that court, the stay shall continue until final disposition in the Supreme Court.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX F

IN THE DISTRICT COURT WITHIN AND FOR
OKLAHOMA COUNTY
STATE OF OKLAHOMA

No. CJ-88-10553

OKLAHOMA NATURAL GAS COMPANY, a division of ONEOK INC., a Delaware corporation,
Plaintiff,

vs.

SMITH COGENERATION, INC., an Oklahoma corporation; POWERSMITH COGENERATION PROJECT, a Delaware limited partnership; WILLIAMS NATURAL GAS COMPANY, a Delaware corporation; and LADD PETROLEUM COMPANY, a Delaware corporation,
Defendants.

PETITION FOR DECLARATORY JUDGMENT

Comes now the plaintiff, Oklahoma Natural Gas Company, a division of ONEOK Inc. ("Oklahoma Natural"), and alleges and states:

1. The plaintiff is a Delaware corporation authorized to operate in Oklahoma. Oklahoma Natural, which is a division of ONEOK Inc., is a gas public utility engaged in furnishing natural gas to more than 265 communities in Oklahoma, serving in excess of 644,000 residential, commercial and industrial customers. Its utility operations and its rates, services, practices and charges in connection therewith are subject to general regulation by the Oklahoma Corporation Commission. Oklahoma Natural's principal office is located at 100 West Fifth Street, P. O. Box 871, Tulsa, Oklahoma 74102.

2. The defendant, Smith Cogeneration, Inc. ("Smith"), an Oklahoma corporation, is general partner of the defendant, PowerSmith Cogeneration Project ("PowerSmith"), which is a Delaware Limited Partnership. The principal office of Smith and PowerSmith is 210 West Park Avenue, Suite 810, Oklahoma City, Oklahoma 73102.

3. The defendant, Williams Natural Gas Company ("Williams") is a subsidiary of The Williams Companies, Inc., which is a Delaware corporation authorized to do business in the State of Oklahoma. The principal office of Williams is One Williams Center, Tulsa, Oklahoma 74103. Williams is in the business of purchasing, transporting and marketing natural gas in interstate commerce, and has part of its pipeline facilities located in Oklahoma County, Oklahoma.

4. The defendant, Ladd Petroleum Company ("Ladd"), a Delaware corporation, is a subsidiary of General Electric Corporation, a Delaware corporation authorized to do business in the State of Oklahoma. The principal office of Ladd in the State of Oklahoma is 321 South Boston Avenue, Tulsa, Oklahoma 74103.

5. Oklahoma Natural operates within the city limits of The City of Oklahoma City, Oklahoma ("Oklahoma City"), providing gas service to residential, commercial and industrial customers. It is authorized to use the streets, alleys and other public rights of way within the limits of Oklahoma City for the purpose of laying pipelines and installing other equipment necessary to transmit and deliver natural gas to customers within the city limits in accordance with a Franchise Agreement ("Franchise" or "Agreement") dated April 24, 1985, which Agreement has been approved by the citizens of Oklahoma City. Section 2 of the Franchise provides:

> *Section 2.* There is hereby granted to Oklahoma Natural Gas Company, a division of ONEOK Inc., a

> corporation, its successors and assigns, for a period of twenty-five years from the passage and approval of this Ordinance and its acceptance by the Grantee, the right to acquire, construct, erect, install, extend, repair, remove, relocate, replace, operate and maintain a system of works, pipes, pipelines, apparatus, structures and appurtenances in, across, upon and under the streets, alleys, avenues, boulevards, lanes, parks, parkways, sidewalks, parkings, driveways, rights of way, utility easements, and other public ways, places, areas and grounds, all being sometimes referred to herein as "streets, alleys, avenues, and other public ways, places and grounds," in The City of Oklahoma City, Oklahoma, as now constituted, and as may be added to hereafter, for the purpose of transporting, distributing and selling gas to said City, its inhabitants and the public generally for domestic, commercial and industrial uses, and for any and all other purposes for which gas, during the period of this grant, may be used, together with the right to enter upon the streets, alleys, avenues and other public ways, places and grounds of said City for the purpose of constructing, maintaining, removing and repairing said works, pipes, pipelines and all necessary apparatus, machinery, structures and appurtenances.

That Franchise Agreement is for a period of twenty-five years, terminating April 24, 2010.

6. PowerSmith is a limited partnership currently constructing an $80 million cogeneration facility at the Oklahoma City Firestone Plant located at 2500 South Council Road, which is within the city limits of Oklahoma City ("Firestone Project").

7. PowerSmith has contracted with Ladd to provide the natural gas requirements of the Firestone Project. Ladd has entered into certain gas purchase contracts

with gas producers in the State of Oklahoma in order to fulfill some or all of those requirements.

8. Williams is an interstate natural gas pipeline company. Ladd has contracted with Williams to transport certain natural gas supplies purchased by Ladd within the State of Oklahoma to PowerSmith's Firestone Project. In order to deliver such gas to the Project, Williams must construct a pipeline system under various streets, alleys and other public rights of way within the city limits of Oklahoma City.

9. Neither Williams nor Ladd nor PowerSmith have a franchise nor intend to obtain one from Oklahoma City in order to use the streets, alleys and other public rights of way within the City.

10. A justiciable issue exists whether it is necessary for Smith, PowerSmith, Williams or Ladd to first obtain a franchise from Oklahoma City prior to using the streets, alleys and other public rights of way for the purpose of laying pipelines and the transmission of natural gas when another entity, in this case, Oklahoma Natural, already possesses a Franchise from Oklahoma City for that same use and purpose.

11. All persons or entities who have or claim any interest which would be affected by the judgment entered in this case have been made parties and a judgment in this case will not prejudice the rights of persons not parties to this proceeding.

12. The Firestone Project currently being constructed by PowerSmith is scheduled for initial completion on January 31, 1989. At that time, PowerSmith will need gas service for a six-month testing period. In order to avoid any delays in PowerSmith's obtaining the gas supply required to operate the Project, it is necessary to determine the rights which Oklahoma Natural possesses as a result of the Franchise which it has obtained from

Oklahoma City. If a judgment is not rendered by this Court at the soonest possible date, substantial damages may result to PowerSmith as a result of the ensuing delay until a determination is reached by this Court concerning Oklahoma Natural's rights under the Franchise.

13. Neither plaintiff nor any of the defendants have sought by any other legal action to have adjudicated their respective rights under said Franchise, and plaintiff is extremely desirous of having this Court act under this petition and construe said Franchise, thereby finally terminating the controversy now existing and avoiding any damages which might be incurred for wrongful delay of PowerSmith's obtaining gas service to its Firestone Project.

WHEREFORE, an actual controversy of a justiciable nature existing, plaintiff prays that this Court, in order to relieve plaintiff of the present uncertainty and insecurity with regard to its rights arising out of said Franchise, to avoid damages to defendant PowerSmith which may be caused due to a delay, and to bring an end to the controversy:

(a) Enter a declaratory judgment construing the rights which plaintiff, Oklahoma Natural, possesses as a result of its Franchise with Oklahoma City; and

(b) Enter a declaratory judgment stating defendants, Smith, PowerSmith, Williams and Ladd, have no right to, and indeed cannot, use any of Oklahoma City's streets, alleys or other public rights of way for the purpose of laying pipelines and other equipment necessary for the transmission of natural gas to defendant PowerSmith's Firestone Project without first obtaining a franchise from Oklahoma City.

HUFFMAN ARRINGTON KIHLE
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IN THE DISTRICT COURT OF
OKLAHOMA COUNTY
STATE OF OKLAHOMA

CJ-88-10553

OKLAHOMA NATURAL GAS COMPANY,
a division of ONEOK Inc., a Delaware corporation,
Plaintiff,

vs.

SMITH COGENERATION, INC., an Oklahoma corporation; POWERSMITH COGENERATION PROJECT, A Delaware limited partnership; WILLIAMS NATURAL GAS COMPANY, a Delaware corporation; and LADD PETROLEUM CORPORATION, a Delaware corporation,
Defendants.

[Filed Dec. 6, 1988]

AMENDED ANSWER OF DEFENDANTS WILLIAMS NATURAL GAS COMPANY AND LADD PETROLEUM CORPORATION

Come now Williams Natural Gas Company, a Delaware corporation (WILLIAMS), and Ladd Petroleum Corporation, a Delaware corporation, (LADD), defendants, by leave of court first obtained, and for their amended answer to the petition of plaintiff deny generally and specifically each and every allegation therein contained, except such as may be hereinafter admitted.

For further answer and defense, said defendants allege and state:

1. Defendants admit the allegations of paragraphs 1, 4, 5, 6, and 9 of the Petition.

2. As to paragraph 2 of the Petition, defendants admit that defendant Smith Cogeneration, Inc., is the managing general partner of PowerSmith Cogeneration Joint Venture, a partnership, which is a general partner of defendant PowerSmith Cogeneration Project, Limited Partnership, (POWERSMITH).

3. Defendants deny only the first sentence of paragraph 3 of the petition and allege that WILLIAMS is a subsidiary of Northwest Energy Company, a Utah corporation, which is a subsidiary of The Williams Companies, Inc., a Delaware corporation, authorized to do business in the State of Oklahoma.

4. Defendants deny the allegations of paragraphs 7, 8, 10 and 11 of the petition to the extent that they are inconsistent with the following allegations:

(a) That by the enactment of 15 U.S.C. § 717, et seq., (the Natural Gas Act), the Congress preempted the regulation of natural gas companies engaged in the transportation of natural gas in interstate commerce, including the transportation of natural gas to the Firestone Project as contemplated by WILLIAMS here.

(b) POWERSMITH has contracted for the purchase of natural gas from (LADD) at facilities located outside the city limits of Oklahoma City that are connected with the interstate transportation system of WILLIAMS. LADD's interest in said contract was thereafter assigned to Ladd Gas Marketing, Inc., a Colorado corporation (LGMI), a wholly-owned subsidiary of LADD.

(c) WILLIAMS has agreed with POWERSMITH and LADD to transport the gas through its existing lines from a point or points located outside the city limits of Oklahoma City to a point inside the city

limits of Oklahoma City located approximately 12 miles from the Firestone Project. WILLIAMS has further agreed, subject to obtaining approval from THE Federal Energy Regulatory Commission (FERC), to construct a new 12 mile extension from its existing line to the Firestone Project and to transport the gas through such line to the Firestone Project. Construction of the extension line will require WILLIAMS to cross Oklahoma City streets at several points. The agreement with WILLIAMS is for transportation services only and does not involve the sale of gas from WILLIAMS to either POWERSMITH, LADD or LGMI.

(d) In order to perform this transportation service, WILLIAMS has applied to the FERC under Section 7(c) of the Natural Gas Act (NGA) for a certificate of public convenience and necessity, authorizing the construction and operation of the facilities necessary to provide transportation services to the Firestone Project. Such application is now pending in Docket No. CP 89-93-000 and has not yet been acted upon by FERC. Under FERC rules and regulations, plaintiff has the right, if done on or before November 29, 1988, to intervene before FERC and object to the granting of WILLIAMS' application. If the application is granted and the certificate is issued, WILLIAMS will have the power of eminent domain, pursuant to provisions of the Natural Gas Act, to condemn any interest in real estate, including city streets, necessary to construct the pipeline, irrespective of plaintiff's franchise, and subject only to compliance with environmental, safety and similar requirements of local concern of the City of Oklahoma City. Moreover, WILLIAMS already is authorized, by virtue of certificate authority obtained from the FERC in Docket No. RP-86-32-009 et al, to provide non-discriminatory gas transportation anywhere on its system on behalf of shippers, including Smith and Ladd. The rights of WILLIAMS to provide,

and of SMITH and LADD to receive, gas transportation services to the Firestone Project in Oklahoma City, notwithstanding plaintiff's franchise, are matters that FERC has decided or will decide in the above-numbered dockets.

(e) WILLIAMS denies that the franchise requirements alleged by plaintiff govern the pipeline contemplated here for the following reasons:

(1) WILLIAMS proposes to obtain the right to cross some city streets by either obtaining permission from Oklahoma City by permit (rather than by franchise) by or condemning the necessary [facilities] pursuant to the Natural Gas Act. The City of Oklahoma City has enacted ordinances, specifically sections 37-201 through 241, which authorize construction of a pipeline by either permit or franchise, whichever WILLIAMS chooses. A true and correct copy of said ordinance is attached hereto as Exhibit "A" and made a part of this answer. The limited use of city streets for the purpose of transporting gas to one end user is not the type of activity requiring a vote of the citizens of Oklahoma City to grant a franchise. Construction of the pipeline by permit rather than by franchise is permissible and provided for by the ordinances of the City of Oklahoma City.

(2) The pipeline contemplated by WILLIAMS is not a "system" as alleged by plaintiff, but a single pipeline.

(3) Plaintiff's franchise is not for the same use and purpose of the streets, alleys and rights of way of the City of Oklahoma City as WILLIAMS intends to make thereof, in that plaintiff's use is for the purpose of transporting, distributing and selling gas to said City, its inhabitants and the public generally, and WILLIAMS' use is for the transportation only of natural gas to the Firestone Project.

5. To the extent that WILLIAMS' application to FERC, as described above, may be considered a legal action to determine defendants' rights with regard to any controversy with plaintiff, the allegations of paragraph 13 of said petition are denied.

6. In addition to transporting gas in Oklahoma City for sale to the public, plaintiff is now and has been transporting gas in Oklahoma City on behalf of sellers other than plaintiff, for which plaintiff pays no revenue to the City of Oklahoma City, asserting that such transportation does not come within the terms and provisions of its franchise, and plaintiff is therefore estopped to assert that WILLIAMS' transportation is an activity for which a franchise is required.

7. That these defendants claim no rights under plaintiff's franchise and that plaintiff has no standing to bring this action.

8. That plaintiff's petition fails to state a claim on which relief can be granted.

WHEREFORE, having fully answered, defendants pray that plaintiff take nothing by its petition and that they be discharged with their costs, and for such other and further relief as may be equitable and proper.

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and Ladd Petroleum Corporation

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 6th day of December, 1988, a true and correct copies of the above and foregoing AMEND ANSWER OF DEFENDANTS WILLIAMS NATURAL GAS COMPANY AND LADD PETROLEUM CORPORATION were hand delivered to:

Messr. John A. Gaberino, Jr., Donald A. Kihle
and Curtis M. Long
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Tulsa, Oklahoma 74103

and

Messrs. Burck Bailey, Harry H. Selph II,
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and PowerSmith Cogeneration Project.

/s/ William R. Burkett
WILLIAM R. BURKETT

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. 89-519T

WILLIAMS NATURAL GAS COMPANY,
a Delaware corporation,
Plaintiff,

v.

THE CITY OF OKLAHOMA CITY, OKLAHOMA
a municipal corporation, and
OKLAHOMA NATURAL GAS COMPANY,
a Delaware corporation,
Defendants.

[Filed Mar. 28, 1989]

COMPLAINT

COMES NOW the plaintiff, Williams Natural Gas Company, a Delaware corporation, ("WILLIAMS") and alleges and states:

1. The plaintiff is a subsidiary of Northwest Energy Company, a Delaware corporation, which is a subsidiary of The Williams Company, Inc., a Delaware corporation authorized to do business in the State of Oklahoma. WILLIAMS is in the business of purchasing, transporting and marketing natural gas in interstate commerce.

2. Defendant, the City of Oklahoma City, Oklahoma ("OKLAHOMA CITY") is a municipal corporation and is the owner of certain property within its city limits.

3. The defendant, Oklahoma Natural Gas Company, ("ONG"), is a Delaware corporation authorized to do business in Oklahoma. ONG transports, distributes and sells gas to Oklahoma City, its inhabitants and the public generally within the city limits of Oklahoma City, Oklahoma.

FIRST CAUSE OF ACTION

VENUE AND JURISDICTION

4. This Court has jurisdiction over Count I of this action pursuant to 28 U.S.C. 1331 in that this case arises under The Natural Gas Act, 15 U.S.C. § 717 et seq. and the value of the property to be condemned exceeds $3,000.00.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

CLAIM FOR RELIEF

6. The plaintiff herein has the power of eminent domain pursuant to the provisions of The Natural Gas Act, to condemn any interest in real estate including city streets.

7. PowerSmith Cogeneration Joint Venture ("PowerSmith"), a partnership, has contracted for the purchase of natural gas from Ladd Petroleum Company at facilities located outside the city limits of Oklahoma City and which are connected at the interstate transportation system of WILLIAMS. WILLIAMS has agreed with PowerSmith and Ladd to transport the natural gas through its existing lines from points located outside the city limits of OKLAHOMA CITY to a point inside the city limits of OKLAHOMA CITY located approximately 12 miles from the Oklahoma City Firestone Plant located at 2500 South Council Road.

8. Pursuant to the above agreement, WILLIAMS has obtained a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission

("FERC") authorizing it to construct, own and operate a 12.4 mile pipeline and related facilities for the purpose of transporting natural gas from Williams existing facilities to the cogeneration plant currently being constructed by PowerSmith. (See certificate attached hereto as Exhibit "A").

9. That under the above Certificate of Public Convenience and Necessity, the facilities must be completed and placed in actual operation within six (6) months from the date of the FERC Certificate. In order to comply with the orders issued under the FERC Certificate, plaintiff is required to lay a pipeline on the land belonging to the defendant, Oklahoma City, which land is described more particularly on the attached Exhibit "B".

10. For the purpose set forth in the FERC Certificate (Exhibit "A"), including the building, laying, maintaining, operating and removing pipelines for the transportation of natural gas, plaintiff necessarily requires the taking, expropriating, condemning and acquiring of a right-of-way and easement over and across the following streets of the defendant, Oklahoma City:

(a) Across south Meridian Avenue in Sections 26 and 27, Township 10N, Range 4, WIM, Cleveland County, Oklahoma, as more particularly appears from the profile of said crossing attached hereto as Exhibit B-1.

(b) Across southwest 149th Street in Sections 22 and 27, Township 10N, Range 4, WIM, Cleveland County, Oklahoma, as more particularly appears from the profile of said crossing attached hereto as Exhibit B-2.

(c) Across southwest 134th Street in Sections 15 and 22, Township 10N, Range 4, WIM, Cleveland County, Oklahoma, as more particularly appears from the profile of said crossing attached hereto as Exhibit B-3.

(d) Across south Rockwell Avenue in Sections 16 and 17, Township 10N, Range 4, WIM, Cleveland County, Oklahoma, as more particularly appears from the profile of said crossing attached hereto as Exhibit B-4.

(e) Across southwest 119th Street in Sections 8 and 17, Township 10N, Range 4, WIM, Cleveland County, Oklahoma, as more particularly appears from the profile of said crossing attached hereto as Exhibit B-5.

(f) Across southwest 104th Street between Sections 5 and 8, Township 10N, Range 4, WIM, Cleveland County, Oklahoma, as more particularly appears from the profile of said crossing attached hereto as Exhibit B-6.

(g) Across southwest 89th Street in Section 5, Township 10N, Range 4, WIM, Cleveland County, Oklahoma, as more particularly appears from the profile of said crossing attached hereto as Exhibit B-7.

(h) Across southwest 74th Street in Sections 29 and 32, Township 11N, Range 4, WIM, Oklahoma County, Oklahoma, as more particularly appears from the profile of said crossing attached hereto as Exhibit B-8.

(i) Across southwest 59th Street between Sections 20 and 29, Township 11N, Range 4, WIM, Oklahoma County, Oklahoma, as more particularly appears from the profile of said crossing attached hereto as Exhibit B-9.

(j) Across southwest 44th Street and Campbell Creek in Sections 17 and 20, Township 11N, Range 4, WIM, Oklahoma County, Oklahoma, as more particularly appears from the profile of said crossing attached hereto as Exhibit B-10.

(k) Across southwest 29th Street in Sections 8 and 17, Township 11N, Range 4, WIM, Oklahoma County, Oklahoma, as more particularly appears from the profile of said crossing, attached hereto as Exhibit B-11.

11. Plaintiff's acquiring and using a right-of-way easement as described hereinabove across Oklahoma City's property will not materially or substantially interfere with Oklahoma City's use of said property.

12. Because of the construction deadlines contained in Exhibit A, plaintiff is ready to commence construction of said pipeline, and delay in said construction would cause irreparable harm; plaintiff's only remedy is this condemnation proceeding and plaintiff therefore is entitled to the equitable relief of immediate possession of the easements here sought.

13. Defendant, Oklahoma City, should be required to appear and set forth what claim, if any, it now has in and to the real property described herein.

WHEREFORE, plaintiff prays for judgment that the property described above be condemned, that plaintiff be given immediate possession of said property, that just compensation for said taking be ascertained and awarded and for such other and further relief as may be equitable and proper.

SECOND CAUSE OF ACTION

VENUE AND JURISDICTION

14. This Court has ancillary jurisdiction, under 28 U.S.C. § 1331, to adjudicate all matters incident[al] to the exercise of primary jurisdiction under said statute.

15. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b).

CLAIM FOR RELIEF

For its cause of action against the defendant, ONG, Williams alleges and states that:

16. Pursuant to a franchise ordinance enacted by the City of Oklahoma City, Oklahoma on April 24, 1985, ONG was granted the right to construct and operate pipelines across, upon and under all the streets of Oklahoma City for the purpose of transporting, distributing and selling gas to the inhabitants of Oklahoma City.

17. ONG claims that such franchise grants it the exclusive right to use Oklahoma City streets for the purpose of transporting gas to consumers in Oklahoma City and has asserted said claim in the District Court of Oklahoma County, Oklahoma, in the case of *Oklahoma Natural Gas Company v. Smith Cogeneration, et al.*, No. CJ-88-10553, in which case said Court has entered an interlocutory order, not yet filed, generally to the effect that under state law, plaintiff may not use said streets to transport gas through a pipeline without a franchise, said Court not having ruled on whether plaintiff's proposed operation of said pipeline is a field pre[e]mpted by the Federal Government. Such claim by ONG is adverse to plaintiff's right to use such property for the purposes set forth in the Certificate of Public Convenience and Necessity issued by FERC to plaintiff. ONG's claim is a cloud on the title plaintiff will obtain by condemnation and is invalid because the transportation of gas by an interstate pipeline is a field preempted by the Federal Government under the Natural Gas Act, 15 U.S.C. 717, et seq.

WHEREFORE, plaintiff prays that it have judgment against the defendant, Oklahoma Natural Gas Company, adjudging that plaintiff is the owner of the above described property once condemned; adjudging that Oklahoma Natural Gas Company's claim of the right to use such condemned property to the exclusion of the plaintiff

until such time as plaintiff also obtains a franchise from Oklahoma City is null and void; adjudging that Oklahoma Natural Gas Company be barred and enjoined from asserting any right, claim or interest in such condemned property adverse to plaintiff and adverse to plaintiff's operation of said pipeline under the authority of said FERC order; adjudging that the title of plaintiff in such condemned property be quieted and confirmed; and granting plaintiff such other and further relief as the Court shall deem just and proper.

HALL, ESTILL, HARDWICK, GABLE,
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APPENDIX H

The Natural Gas Act, as amended, 15 U.S.C. § 717 *et seq.*, states in pertinent part:

Section 1, 15 U.S.C. § 717. Necessity for regulation of natural gas companies

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the

rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

Section 7, 15 U.S.C. § 717f. Construction, extension, or abandonment of facilities; certificate of convenience and necessity; condemnation proceedings

(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) (1) (A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested

persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) (1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found

that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) (1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

* * * *

(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

Section 19, 15 U.S.C. § 717r. Rehearings; court review of orders

(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for

rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable

ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28.

(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

APPENDIX I

The Full Faith and Credit Act, 28 U.S.C. § 1738, states:

> **State and Territorial statutes and judicial proceedings; full faith and credit**
>
> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.

The Anti-Injunction Act, 28 U.S.C. § 2283, states:

> **Stay of State court proceedings**
>
> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or affectuate its judgments.

The Oklahoma Declaratory Judgment Act, 12 Okla. Stats. 1981, § 1651, states:

Determination of rights, status or other legal relations—Exceptions

District courts may, in cases of actual controversy, determine rights, status, or other legal relations, including but not limited to a determination of the construction or validity of any foreign judgment or decree, deed, contract, trust, or other instrument or agreement or of any statute, municipal ordinance, or other governmental regulation, whether or not other relief is or could be claimed, except that no such declaration shall be made concerning liability or nonliability for damages on account of alleged tortious injuries to persons or to property either before or after judgment or for compensation alleged to be due under workers' compensation laws for injuries to persons or concerning obligations alleged to arise under policies of insurance covering liability or indemnity against liability for such injuries. The determination may be made either before or after there has been a breach of any legal duty or obligation, and it may be either affirmative or negative in form and effect; provided however, that a court may refuse to make such determination where the judgment, if rendered, would not terminate the controversy, or some part thereof, giving rise to the proceeding.

Article 18, § 5(a), of the Oklahoma Constitution states:

FRANCHISES

Grant, extension or renewal—Approval by voters —Term

No municipal corporation shall ever grant, extend, or renew a franchise, without the approval of a

majority of the qualified electors residing within its corporate limits, who shall vote thereon at a general or special election; and the legislative body of any such corporation may submit any such matter for approval or disapproval to such electors at any general municipal election, or call a special election for such purpose at any time upon thirty days' notice; and no franchise shall be granted, extended, or renewed for a longer term than twenty-five years.

Article 18, § 7, of the Oklahoma Constitution states:

Control and regulation not divested—Surrender of powers—Exclusive franchises

No grant, extension, or renewal of any franchise or other use of the streets, alleys, or other public grounds or ways of any municipality, shall divest the State, or any of its subordinate subdivisions, of their control and regulation of such use and enjoyment.

Nor shall the power to regulate the charges for public services be surrendered; and no exclusive franchise shall ever be granted.

Supreme Court, U.S.
FILED
MAR 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-1296

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

OKLAHOMA NATURAL GAS COMPANY,
Petitioner,

v.

WILLIAMS NATURAL GAS COMPANY,
SMITH COGENERATION, INC.,
POWERSMITH COGENERATION PROJECT,
LIMITED PARTNERSHIP, and
CITY OF OKLAHOMA CITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT BRIEF IN OPPOSITION OF WILLIAMS NATURAL GAS COMPANY, SMITH COGENERATION, INC., AND POWERSMITH COGENERATION PROJECT, LIMITED PARTNERSHIP

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QUESTIONS PRESENTED

1. Does Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b), preclude collateral litigation between parties of issues that could and should have been raised before FERC but intentionally were not as a tactical ploy to undermine FERC policy?

2. In an enforcement proceeding brought pursuant to Section 7(h) of the Natural Gas Act, 15 U.S.C. § 717f(h), may a lower federal court enjoin a state court judgment barring enforcement of a FERC certificate, where the state court decision constitutes an impermissible collateral attack upon the FERC certificate in violation of the Natural Gas Act's exclusive jurisdictional framework for the review and enforcement of FERC orders?

RULE 29.1 LISTING

The parent of respondent Williams Natural Gas Company is The Williams Companies, and affiliates or subsidiaries (except wholly-owned subsidiaries) are:

BankOklahoma Corp.
Kern River Gas Supply Corporation
Kern River Service Corporation
Apco Argentina Inc.
Apco Properties Ltd.
Northwest Border Pipeline Company
Texasgulf, Inc.

Respondents Smith Cogeneration, Inc., and PowerSmith Cogeneration Project, Limited Partnership ("PowerSmith"), do not have any parents or subsidiaries. The partners in PowerSmith, and the parents, affiliates or subsidiaries (except wholly-owned subsidiaries) of those partners are:

John Hancock Mutual Life Insurance Company
PacifiCorp
Prudential Insurance Company of America
Essex Syndicate, Inc.
John Street Syndicate
Niagara Mohawk Power Corporation
HYDR -CO, Enterprises, Inc.
Beebe Island Corporation
HCE Dodge Falls, Inc.
HCE Imperial Valley, Inc.
HCE Pepperell, Inc.
HCE-Salt City Power, Inc.
HYDRA-CO Generation, Inc.
HYDRA-CO Operations, Inc.
McReau Manufacturing, Inc.
Power Mining, Inc.
New Bern Energy Recovery, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1296

OKLAHOMA NATURAL GAS COMPANY,
Petitioner,

v.

WILLIAMS NATURAL GAS COMPANY,
SMITH COGENERATION, INC.,
POWERSMITH COGENERATION PROJECT,
LIMITED PARTNERSHIP, and
CITY OF OKLAHOMA CITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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JOINT BRIEF IN OPPOSITION OF WILLIAMS NATURAL GAS COMPANY, SMITH COGENERATION, INC., AND POWERSMITH COGENERATION PROJECT, LIMITED PARTNERSHIP

Respondents Williams Natural Gas Company, Smith Cogeneration, Inc., and PowerSmith Cogeneration Project, Limited Partnership, respectfully request this Court to deny the petition for writ of certiorari, seeking review of the United States Court of Appeals for the Tenth Circuit's opinion in this case. That opinion is reported at 890 F.2d 255.

STATEMENT

This case arises from the efforts of Oklahoma Natural Gas Company (ONG) to prevent a new cogeneration plant from obtaining a competitive gas transportation service from an interstate pipeline, although the Federal Energy Regulatory Commission (FERC) has authorized that interstate service, finding it required by the public convenience and necessity under Section 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e). PowerSmith Cogeneration Project, Limited Partnership (PowerSmith), is the developer of an $84 million, 110-megawatt cogeneration facility on the grounds of the Firestone Tire and Rubber Company plant in Oklahoma City, Oklahoma.[1] The cogeneration facility burns large quantities of natural gas to generate electricity for sale to a local electric utility and also to cogenerate steam for use in the manufacture of tires at Firestone's plant. PowerSmith contracted for the purchase of natural gas from Ladd Gas Marketing, Inc.

PowerSmith initially sought to obtain transportation of the natural gas from ONG. Although ONG holds a non-exclusive franchise for the sale and distribution of natural gas in Oklahoma City, the rates and terms of service under which ONG provides transportation services to consumers are not regulated. ONG was unwilling to offer transportation services to PowerSmith on competitively priced terms.

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[1] Respondent Smith Cogeneration, Inc., is the general partner in PowerSmith, and is denoted jointly as "PowerSmith," along with the partnership.

The federal statutory scheme governing cogeneration projects is set out in Section 210 of the Public Utility Policies Act of 1978, 16 U.S.C. § 824a-3(a). Pursuant to this authority, FERC certified PowerSmith's project as a "qualifying cogeneration facility." *Firestone Cogeneration*, 33 FERC (CCH) ¶ 62,481 (1985); *PowerSmith Cogeneration Project*, 42 FERC (CCH) ¶ 62,121 (1988).

Accordingly, PowerSmith sought transportation services from Williams Natural Gas Company (Williams), an interstate natural gas pipeline with facilities located about 12 miles from the cogeneration plant. Williams is subject to comprehensive regulation by FERC and, pursuant to such regulation, is required to provide transportation to the public on an open-access, non-discriminatory basis.[2] In contrast to ONG, Williams was willing to provide transportation on terms acceptable to PowerSmith. However, in order to construct the 12-mile pipeline to the cogeneration plant, Williams was required to apply for and obtain a certificate of public convenience and necessity from FERC pursuant to Section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c).

1. Unwilling to accept its loss in the marketplace of PowerSmith's business, ONG sought to undermine the results of competition through a strategy of piecemeal litigation. While Williams was in the process of obtaining final state environmental approvals before filing its certificate application at FERC, ONG filed a petition in state court for a declaratory judgment that Williams may not serve PowerSmith without first obtaining a franchise through an election of the voters in Oklahoma City.[3] Then, when Williams filed its certificate application at FERC ten days later, ONG intervened in op-

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[2] In the mid-1980's, FERC embarked upon a fundamental restructuring of the regulatory framework governing interstate natural gas transportation, the principal purpose of which is to enhance competition. *See Associated Gas Distrib. Co. v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). As part of this program, FERC adopted regulations providing for open-access, non-discriminatory transportation by interstate pipelines. 18 C.F.R. §§ 284.8(b), 284.9(b) (1989).

[3] As Justice Brandeis explained in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 282-83 n.2 (1932) (dissenting), "[b]efore the advent of the certificate of public convenience and necessity, similar but less flexible control over the entry of many public utilities into business was exercised through the grant of franchises, municipal or state."

position and protested, arguing, among other things, that Williams' service should be subject to local regulation, either in place of or in addition to FERC regulation (Resp. App. 7a-13a, 22a). ONG asserted that, even if FERC had jurisdiction, concurrent local regulation was justified because local concerns were posed by Williams' efforts to serve a customer "in the heart of ONG's service territory" (*id.* at 13a).

While ONG was opposing Williams at FERC, the state court bifurcated the declaratory judgment action, first proceeding to decide the question whether Williams would be required by state law to obtain a franchise in an election of the voters before serving PowerSmith. The state court deferred briefing and consideration of whether, if the state law franchise requirement were found applicable to Williams' service to PowerSmith, it would be preempted by the Natural Gas Act or the FERC certificate.

FERC and the state court both issued their initial decisions on February 16, 1989. FERC granted Williams' certificate application and rejected ONG's opposing arguments (Pet. App. 45a-61a). FERC found, contrary to ONG's claim, that Williams would be providing interstate, not intrastate, service to PowerSmith (*id.* at 52a-55a), and that state authorities could not "effectively regulate[]" this transportation service, given the flow of natural gas across state lines (*id.* at 54a n.15). FERC also rejected ONG's claim that Williams' service posed essentially local concerns and therefore should be subject to local regulation. FERC held (*id.* at 54a-55a) that

> irrespective of any local effects resulting from the by-pass, we believe that the transportation service at issue here essentially concerns federal interests, that is, those embodied in developing interstate transportation policy that provides consumers with a variety of supply options by promoting a competitively priced spot market for natural gas.

Applying its broad mandate to determine the national public interest in energy policy, FERC refused "to shield" ONG "from the forces of competition" (*id.* at 58a). FERC specifically recognized that authorizing Williams to construct the pipeline to PowerSmith's plant "will result in the gas being transported by [Williams] directly to an end user located in ONG's distribution area" (*ibid*). As FERC determined, however, this simply was the result of ONG losing the competition for PowerSmith's business (*ibid*). Finding no "evidence of unfair competition," FERC held that "the public interest is best served by allowing the market to determine who will provide service" (*ibid*). FERC also found that Williams' service to PowerSmith would benefit not only the parties to the transactions, but also the citizens and general economy of Oklahoma (*ibid*). In sum, FERC granted Williams a certificate (*id.* at 61a) based on the determination under Section 7(e) that the public convenience and necessity "required" Williams to compete with PowerSmith. 15 U.S.C. § 717f(e).

In contrast to FERC's holding that the public interest and federal policy required ONG to be subject to competition from Williams, the state court held that the purpose of the state law franchise requirement was to insulate ONG from competition from non-franchisees. Accordingly, the state court held that Williams could not provide gas transportation services to PowerSmith in competition with ONG until Williams first obtained a franchise through an election of the voters in Oklahoma City. Pet. App. 22a-24a. The state court reserved disposition of the preemption issue pending further briefing (*Id.* at 24a).

On March 1, 1989, ONG sought rehearing of the FERC certificate pursuant to the detailed review procedures set forth in Section 19 of the Natural Gas Act, 15 U.S.C. § 717r. In addition to its public policy conten-

tions, ONG argued that, even if Williams' proposed pipeline was subject to FERC certificate regulation, it still was subject to concurrent local regulation (Resp. App. 33a-35a). ONG claimed that Williams' service to PowerSmith was "a situation of essentially local concern" (*id.* at 34a) because Williams' effort to compete within ONG's service territory allegedly could adversely affect the rates ONG charges its other customers (*id.* at 21a-22a, 27a-29a, 34a-35a). ONG also urged FERC to defer action on Williams' application pending the resolution of ONG's state court action (*id.* at 32a, 37a-38a). ONG informed FERC of the state court's decision that Williams was required to obtain a state law franchise in order to use the city streets for the construction and operation of the pipeline to PowerSmith (*ibid.*). ONG then claimed (*id.* at 38a) that

> [t]his action goes directly to the interests of the citizens of Oklahoma City. The Commission should defer its action in this case pending the result of that [state court] decision because of its effect on the people most interested in it—the people who must live with its results on a daily basis.

While ONG's request for rehearing was pending at FERC, Williams accepted its FERC certificate and sought enforcement by filing a complaint in the United States District Court for the Western District of Oklahoma. Invoking the court's federal eminent domain authority under Section 7(h) of the Natural Gas Act, 15 U.S.C. § 717f(h), Williams sought to condemn rights-of-way across Oklahoma City streets necessary to construct and operate the pipeline to PowerSmith. Williams also sought to quiet its title to these rights-of-way against ONG's countervailing assertion of state law franchise rights. Pet. App. 93a-99a. PowerSmith intervened in support of Williams. ONG opposed Williams' complaint, but Oklahoma City, the owner of the property, did not.

On April 18, 1989, the district court issued an order granting Williams "immediate possession" of the rights-

of-way for the purpose of constructing the pipeline pursuant to the FERC certificate (Pet. App. 33a-34a). Ten days later, however, upon ONG's motion, the state court issued a temporary restraining order (TRO) enjoining Williams from constructing or operating the pipeline. On the next business day, the district court "stayed" the state court's TRO to the extent it prevented Williams from constructing the pipeline, on the grounds that (i) the federal court first asserted *in rem* jurisdiction over the pipeline rights-of-way and (ii) the state court TRO directly interfered with the federal court's prior order allowing Williams to construct the pipeline (*id.* at 36a-38a). The district court, however, refused to stay the TRO to the extent it prevented Williams from operating the pipeline, instead deferring the preemption issue to the state court because that issue had "been first presented" in the latter court (*id.* at 37a). Williams then constructed the 12-mile pipeline to PowerSmith's plant.

On May 19, 1989, the state court issued its decision on preemption (Pet. App. 26a-30a). The state court found that it had jurisdiction over the parties and the subject matter, but did not address respondents' claim that ONG's state action was an impermissible collateral attack on the FERC proceedings (*id.* at 28a). The state court further found that Williams' proposed service to PowerSmith raised "essentially local concern[s]" because Williams' competition with ONG would "result[] in adverse economic effects on the local utility customers" (*id.* at 29a). On this basis, the state court concluded that the Natural Gas Act did not preempt the franchise requirement (*ibid.*). The state court permanently enjoined Williams from operating the pipeline to serve PowerSmith pursuant to the FERC certificate without first obtaining a franchise (*id.* at 30a).

Williams and PowerSmith then requested the federal district court to enjoin enforcement of the state court injunction. The district court denied relief, although it

recognized that Section 7(h) provides FERC certificate-holders with eminent domain authority "for the construction, maintenance, and *operation*" of certified pipelines (Pet. App. 39a-40a n.1 (citing 15 U.S.C. § 717f(h) (emphasis added)). The district court held that *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415-16 (1923), "barred" it "from addressing the question of pipeline operation" once the state court had ruled (Pet. App. 41a).

The very next day, FERC denied ONG's request for rehearing of the certificate. FERC rejected all of ONG's arguments, in particular dismissing ONG's claim of adverse local rate impacts as groundless and speculative (Pet. App. 70a). FERC also addressed the preemption issue, expressly stating that the state court's decision upholding the franchise was "erroneous" (*id.* at 65a n.5). FERC affirmed that Williams' service to PowerSmith falls within FERC's exclusive jurisdiction over interstate transportation service, leaving no room for application of the franchise requirement to protect allegedly local concerns (*ibid.*).

Williams and PowerSmith appealed the district court's refusal to enforce the FERC certificate against the state court injunction to the United States Court of Appeals for the Tenth Circuit, and they appealed the state court's franchise and preemption decisions to the Oklahoma Supreme Court. ONG sought review of the FERC certificate in the United States Court of Appeals for the District of Columbia Circuit.[4]

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[4] ONG's petition for review of the FERC certificate has been fully briefed and is scheduled for oral argument before the D.C. Circuit on March 20, 1990. On February 23, 1990, ONG filed with the D.C. Circuit a conditional motion for leave to file a supplemental brief on preemption issues, if this Court denies ONG's petition for certiorari. ONG also asked the D.C. Circuit to defer a decision on the merits until this Court acts on ONG's petition. Williams and PowerSmith opposed this motion. The appeal before the Oklahoma Supreme Court has also been fully briefed.

2. The court of appeals below reversed the district court's partial denial of injunctive relief. The court determined, upon scrutiny of FERC's orders and ONG's pleadings before FERC and the state court (Pet. App. 3a-5a, 15a-17a), that ONG's state court action was an impermissible collateral attack on the FERC certificate (*id.* at 13a-18a). Hence, the court held (*ibid.*) that ONG had violated the exclusive procedures set out for review of FERC orders in Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

In holding that ONG's state court action was an impermissible collateral attack, the court of appeals relied (Pet. App. 11a-17a) upon the reasoning of *City of Tacoma v. Taxpayers*, 357 U.S. 320 (1958). The court of appeals found that, even if ONG did not raise preemption arguments before FERC and on direct review, it could and should have raised those arguments there (Pet. App. 16a-17a). The court of appeals further found that ONG, expecting that Williams would successfully obtain a certificate at FERC, "filed its action in state court as a 'preemptive strike'" against the FERC proceedings (*id.* at 17a). This, the court held (*ibid.*), amounted to piecemeal litigation of the sort precluded by Congress in Section 19(b). The court, therefore, concluded that the district court should have enjoined the state court proceedings, leaving ONG to raise its preemption arguments, if at all, on direct review of the FERC orders (*id.* at 18a).

The court of appeals also rejected the district court's reliance on *Rooker*. The court of appeals held that, while both state and federal courts generally do have authority to decide preemption issues, that authority does not permit any court to entertain an impermissible collateral attack upon FERC orders (Pet. App. 18a-21a). In this context, the court of appeals found that *Rooker* did not apply to "shield" the state court decision from a proper exercise of federal injunctive authority (*id.* at 20a). Ac-

cordingly, the court of appeals ordered the district court to enjoin enforcement of the state court injunction against Williams' operation of its FERC-certificated pipeline (*id.* at 18a, 21a).

ARGUMENT

The court of appeals correctly decided issues that are narrowly based upon the particular facts of this case. Its decision rests upon a routine application of *City of Tacoma*, 357 U.S. 320, and does not conflict with any decision of this Court or any other court of appeals. Review by this Court, therefore, is not warranted.

1. Contrary to ONG's erroneous assertions, the court of appeals did not "effect a sharp break with [the] normal pattern" or adopt a broad new rule generally divesting state courts of jurisdiction to decide preemption issues (Pet. 13). Rather, the court simply engaged in a particularized, fact-bound application of *City of Tacoma*. The court of appeals correctly reasoned (Pet. App. 12a) that FERC's issuance of its certificate order triggered the exclusive review procedures mandated by Section 19. At that point, Section 19 required the parties to litigate "all issues inhering in the controversy" before FERC on rehearing and, subsequently, before a court of appeals on direct review of the FERC orders. *See City of Tacoma*, 357 U.S. at 336; *see also, e.g., Mississippi Power & Light Co. v. Mississippi*, 108 S. Ct. 2428, 2440-41 (1988); *Whitney Nat'l Bank v. Bank of New Orleans Bank & Trust Co.*, 379 U.S. 411, 419-22 (1965); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48-50 (1938); *United States v. Corrick*, 298 U.S. 435, 438-39 (1936).

ONG asserts that the court of appeals misapplied *City of Tacoma* because the preemption issue does not go to the "validity" or "lawfulness" of the FERC certificate (Pet. 15-16). But *City of Tacoma* expressly bars collateral litigation of whether a licensee is able under state

law to act pursuant to FERC authority, where the issue could and should have been raised before FERC. 357 U.S. at 336, 339. The enforceability against Williams of the state law franchise provision goes to the very heart of whether Williams satisfies Section 7(e)'s requirement of being "able and willing properly to do the acts and to perform the service proposed." 15 U.S.C. § 717f(e). The preemption issue, therefore, falls squarely within the scope of collateral litigation proscribed by *City of Tacoma.*

In essence, ONG contests the court of appeals' finding that ONG "could and should have" raised the preemption issue before FERC. The court of appeals found that ONG brought its state court action as a "preemptive strike" against the FERC proceeding (Pet. App. 17a). ONG now claims that it had no reason to anticipate that Williams would necessarily seek a certificate from FERC when it initiated state court litigation. This assertion is directly at odds with ONG's representation at oral argument to the contrary, and the court of appeals found that ONG brought the state court action in anticipation of the FERC proceeding (*id.*). This finding is reinforced by ONG's awareness of FERC's previously articulated policy of approving bypass transportation arrangements like those between Williams and PowerSmith. *E.g., American Distrib. Co.*, 37 FERC (CCH) ¶ 61,282 (1986); *see generally Kansas Power and Light Co. v. FERC*, 891 F.2d 939, 941 (D.C. Cir. 1989). The court of appeals' conclusion was shared by FERC, which in its brief as *amicus curiae* to the court of appeals characterized ONG's state court action as an "end run" around the Section 19(b) review procedures (Resp. App. 46a).

The court of appeals' finding that ONG could and should have raised preemption in the FERC proceeding also follows from the court's conclusion that ONG raised preemption before FERC "in everything but name" (Pet.

App. 15a). For example, before both FERC and the state court, ONG contended that Congress' intent in enacting the Natural Gas Act was to permit concurrent federal-state jurisdiction over interstate transportation services, such as Williams would render. *Compare* Resp. App. 13a, 22a, 33a-35a *with* Pet. App. 29a-30a; *see* Pet. App. 15a-16a. ONG claimed in both proceedings that, since Williams' transportation service to PowerSmith raises essentially local concerns, it should be subject to local regulation—if not in place of, then in addition to, FERC regulation (*ibid.*). The "local concerns" identified by ONG in both the FERC and state court proceedings involved adverse retail rate impacts that allegedly would result if Williams were able to compete with ONG for service to large industrial customers in ONG's franchised service territory. *Compare* Resp. App. 13a, 21a-22a, 27a-29a, 35a *with* Pet. App. 28a-30a. FERC, however, rejected each of ONG's arguments, holding that national concerns predominated over local concerns, that the broader benefits to the nation and Oklahoma outweighed ONG's allegations of adverse rate impact, and that those allegations, in any event, were unfounded and speculative (Pet. App. 54a-55a, 69a-70a). FERC held, moreover, that its jurisdiction over the Williams' transportation service was "exclusive" and that the state franchise requirement could not validly be applied to Williams (Pet. App. 65a n.5).[5]

On the basis of these circumstances, the court of appeals correctly recognized that ONG's arguments before

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[5] ONG errs in claiming (Pet. 20 n.17) that FERC acted gratuitously in expressing its disagreement with the state court's preemption decision. FERC stated (Pet. App. 65a) that that disagreement did not figure into its decision to grant Williams a certificate and deny rehearing. FERC, however, has authority to preempt state law through its orders, *see Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153-54 (1982), and that effectively is what it did here.

FERC and the state court were hardly as discrete as ONG now claims (Pet. 14-16). Rather, the court of appeals determined that ONG's arguments to FERC were "laced with the theme of conflict between state and federal regulation" (Pet. App. 15a). ONG intentionally avoided articulating its argument before FERC in preemption terms to forestall an expected adverse ruling by FERC on that issue, as part of a strategy to undermine FERC authority with state court litigation.[6] Mere litigation strategy, however, does not defeat the rule against collateral attack; it is the very reason for that rule. Upon examination of the pleadings and circumstances, the court of appeals held that ONG's preemption argument was little more than a restatement of its claims before FERC, submitted under a new caption. *Cf. Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324 (1981) (litigants do not avoid exclusive federal authority by "mere artful pleading"). In this context, the court of appeals correctly concluded that ONG could and should have litigated the preemption issue before FERC. There is no reason for this Court to disturb that finding.

Unable to overcome the findings of the court of appeals, ONG advocates an unwarranted narrowing of *City of Tacoma*. In ONG's view, *City of Tacoma* does no more than prevent a litigant from raising in collateral litigation issues it actually presented in a prior agency proceeding. To ONG, *City of Tacoma* rests narrowly upon principles of issue preclusion or collateral estoppel. But the language of the decision is directly to the contrary. The Court expressly held that the requirement of "statutory finality" set out in the agency's exclusive review provisions "need not be labeled *res judicata*, estoppel, col-

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[6] Before ONG initiated its state court action, FERC already had rejected assertions, like that made by ONG, that states may exercise concurrent jurisdiction over bypass transportation arrangements such as those at issue here. *E.g., Mojave Pipeline Co.*, 42 FERC (CCH) ¶ 61,351, at 61,001-02 (1988).

lateral estoppel, waiver or the like." 357 U.S. at 336-37. *City of Tacoma* bars collateral litigation of *all* issues "inhering in the controversy" between the litigants, including preemption issues, which could and should be raised in the agency proceeding. 357 U.S. at 336. Indeed, it was a preemption issue that the Court in *City of Tacoma* barred from collateral litigation. *See* 357 U.S. at 332-33, *rev'g City of Tacoma v. Taxpayers*, 307 P.2d 567, 576-77 (Wash. 1957).[7]

ONG further errs in suggesting that FERC "apparently" disagrees with the court of appeals' application of *City of Tacoma* (Pet. 20-21). As noted, FERC held that it was exercising *exclusive* jurisdiction over Williams' transportation to PowerSmith with the effect of displacing the state franchise requirement (Pet. App. 65a n.5). Nowhere did FERC suggest that it was permissible for

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[7] ONG also errs in seeking (Pet. 21) to limit *City of Tacoma* to cases involving Section 9 of the Federal Power Act, 16 U.S.C. § 802. Contrary to ONG's assertion, the Court based its rationale in *City of Tacoma*—not on Section 9—but on the language of the exclusive review provisions of Section 313(b) of the Federal Power Act, 16 U.S.C. § 824*l*(b), which is identical to Section 19(b) of the Natural Gas Act. In any event, certificate proceedings under the Natural Gas Act involve much the same showing as do hydroelectric licensing cases under Section 9 of the Federal Power Act. Section 7(e) of the Natural Gas Act requires that certificate applicants must be found "able . . . to do the acts and to perform the service proposed," 15 U.S.C. § 717f(e), and FERC's regulations implementing the Natural Gas Act, 18 C.F.R. §§ 157.6(b)(5), 157.14(a)(2) (1989), require certificate applicants to supply information with respect to compliance with other regulatory requirements, such as those imposed by state law. It is no wonder, then, that lower courts have not hesitated to follow *City of Tacoma* in Natural Gas Act cases. *See Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184 (8th Cir. 1988); *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1566 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987). In this case, moreover, ONG itself placed the validity of the state franchise requirement before FERC by arguing (Resp. App. 23a, 37a-38a) that FERC was required to defer action in light of the state proceedings.

the state court in this case to rule on preemption and to overturn FERC's exercise of exclusive jurisdiction. Indeed, FERC said just the opposite in its brief as *amicus curiae* to the court of appeals, arguing that "unless overturned," the state court decision would "unlawfully render unenforceable the Commission's orders . . ." (Resp. App. 40a). FERC further stated that, in bringing the state litigation, ONG attempted "to evade [a] proper resolution of its concerns" under Section 19(b) "by an end run to an inappropriate state forum" (*id.* at 46a). FERC, then, expressly advocated the finding, adopted by the court of appeals, that ONG had mounted an impermissible collateral attack on the certificate.

In light of the foregoing, there is no foundation for ONG's claim (Pet. 11-12, 21) that the necessary result of the court of appeals' decision is to compel litigants to raise all preemption issues at FERC. Nor is ONG correct in contending (Pet. 22) that that decision creates uncertainty for litigants. To the contrary, the court of appeals has merely reaffirmed the clear mandate of *City of Tacoma* prohibiting collateral attacks and the kind of gamesmanship conducted by ONG in this litigation. This application of *City of Tacoma* is correct and narrowly based on the particular circumstances of this case.[8]

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[8] ONG, thus, misconstrues the holding of the court of appeals and of this Court in *City of Tacoma* when it cites (Pet. 18-19) to other cases in which courts decided preemption issues outside the context of a FERC proceeding. None of those cases involved the collateral litigation of an issue "inhering in the controversy" which could and should have been raised in an ongoing agency proceeding. In any event, those cases do not address collateral attack arguments, and therefore do not directly conflict with the court of appeals' decision. Nor does *Pan American Petroleum Corp. v. Superior Court*, 366 U.S. 656 (1961), suggest a contrary result. As the court of appeals noted (Pet. App. at 20a n.12), *Pan American* did not involve collateral litigation brought to undermine FERC authority. The *Pan American* court specifically stated that the case did not raise any issue regarding whether the private contract rights at issue were "reinforc[ed] or abrogat[ed]" by the Natural Gas Act. 366 U.S. at 664. *Pan*

2. Finally, ONG is wrong when it asserts that the lower federal court was without power to enjoin the state court's interference with the FERC certificate. As the court of appeals recognized (Pet. App. 19a-20a), federalism is a two-way street. State courts, accordingly, are prohibited from enjoining ongoing federal proceedings. *Donovan v. City of Dallas*, 377 U.S. 408 (1964). Here, as the court of appeals found (Pet. App. 18a-20a), the state court effectively enjoined the FERC certificate, thus arrogating to itself the appellate review of FERC orders which Section 19(b) places within the exclusive jurisdiction of the United States courts of appeals on direct review. The state court's action, therefore, violated the Natural Gas Act's exclusive framework for the review and enforcement of FERC orders, *see* Sections 19(b) and 7(h), 15 U.S.C. § 717r(b), § 717f(h), thereby undercutting the uniformity of federal regulatory policy over the natural gas industry which that framework is designed to protect.[9]

a. Contrary to ONG's claim (Pet. 24), the lower federal court was fully authorized to enjoin the state court's interference with exclusive federal jurisdiction. The federal eminent domain proceedings in this case fall within the *in rem* exception to the Anti-Injunction Act, 28 U.S.C. § 2283. *See Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 641 (1977) (plurality opinion); 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4225 (1988 & Supp. 1989). Although ONG neglects to mention it, the federal district court initially granted

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American, therefore, did not involve any of the concerns of statutory finality, uniformity of federal regulation and avoidance of piecemeal litigation that were so prominent in *City of Tacoma*.

[9] FERC has applied the pro-competitive policies given effect here throughout the nation by approving bypass arrangements that result from fair competition. *E.g., Northern Natural Gas Co.*, 46 FERC (CCH) ¶ 61,270 (1989); *Cascade Natural Gas Corp. v. Northwest Pipeline Corp.*, 46 FERC (CCH) ¶ 61,077 (1989). The decision of the court of appeals prevents impermissible collateral litigation from disrupting this national pro-competitive policy.

partial injunctive relief to Williams and PowerSmith by "stay[ing]" the state court's TRO (Pet. App. 36a-37a). The district court found that it was the first to exercise *in rem* jurisdiction over the easements needed by Williams to cross Oklahoma City streets with its pipeline, and concluded that the state court's TRO interfered with the federal court's priority of *in rem* jurisdiction (*ibid.*). ONG never appealed this finding.

The district court erred, however, in refusing to grant full injunctive relief against the state court's consideration of the preemption issue. The district court granted an injunction to ensure that Williams could construct its pipeline as ordered by FERC, but did not extend the injunction to ensure that Williams could *operate* its pipeline as ordered by FERC (Pet. App. 37a, 39a-40a n.1). In failing to do so, the district court violated Section 7(h), which ensures certificate-holders the rights necessary to "construct, *operate*, and maintain" FERC-certificated pipelines. 15 U.S.C. § 717f(h) (emphasis added). As a result, the district court failed to grant Williams condemnation authority sufficient to give effect to the public purpose of the FERC certificate. *See Thatcher v. Tennessee Gas Transmission Co.*, 180 F.2d 644, 647 (5th Cir.), *cert. denied*, 340 U.S. 829 (1950) (Congress enacted Section 7(h) to ensure that the Natural Gas Act's "full statutory scheme of control and regulation could be made effective").

b. Furthermore, neither the Full Faith and Credit Statute, 28 U.S.C. § 1738, nor the *Rooker* case required the court of appeals to give preclusive effect to the state court's decision. This is not a case where the federal and state courts properly have concurrent jurisdiction, so that the first judgment may have preclusive effect in the other proceeding. Here, the federal courts have priority of *in rem* jurisdiction and, therefore, have "exclusive jurisdiction to proceed." *Donovan*, 377 U.S. at 412 (citing *Princess Lida v. Thompson*, 305 U.S. 456, 465-68 (1939)).

Moreover, under *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380-81 (1985), federal courts need accord no more preclusive effect to a prior state court decision than that decision would receive under state law. As do most state courts, *see id.* at 382, the Oklahoma courts require jurisdictional competency as a prerequisite to giving preclusive effect.[10] Further, they give particular attention to whether preclusive effect would "disturb 'the scheme of remedies' " afforded under a federal agency's organic statute. *Dority v. Green Country Castings Corp.*, 727 P.2d 1355, 1360 (Okla. 1986) (quoting Restatement (Second) of Judgments § 83(3) (1982)); *accord*, Restatement (Second) of Judgments §§ 12(2), 28 and 86(2) (1982). Here, the state court lacked subject matter jurisdiction to entertain ONG's impermissible collateral attack on the FERC certificate orders (Pet. App. 12a-15a).[11] For this reason, too, the state court decision is not entitled to preclusive effect.

In any event, preclusion was not required here because the Natural Gas Act creates an exclusive jurisdictional scheme. That statute gives FERC exclusive jurisdiction over the interstate transportation of natural gas as part of a comprehensive regulatory framework designed to

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[10] *See Dana P. v. Oklahoma*, 656 P.2d 253, 256-57 (Okla. 1982) ("[i]t is elementary" that preclusive effect is not given to final "judgments which are void for lack of personal or subject matter jurisdiction," where the jurisdictional defect is apparent on the record); *accord*, Restatement (Second) Judgments § 26(1)(c) (1982). The record in the state court case included the ONG pleadings and FERC orders on which the court of appeals relied in finding that ONG was engaged in an impermissible collateral attack.

[11] Natural Gas Act § 19(b) (court of appeals on direct review has "exclusive" jurisdiction); *e.g.*, *Whitney Bank*, 379 U.S. at 419-22; *City of Tacoma*, 357 U.S. at 336 (statutory review procedures "preclude[] . . . all other modes of judicial review," including state court litigation); *Bethlehem Shipbuilding*, 303 U.S. at 48-50) (court acting outside exclusive review procedures lacks jurisdiction); *Corrick*, 298 U.S. at 438.

achieve uniform national policy. *E.g., Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 300-05 (1988). Also to ensure uniformity, the Natural Gas Act provides an exclusive framework for the review and enforcement of FERC orders. *Cf., e.g., City of Tacoma*, 357 U.S. at 335-37. This Court and the lower federal courts have repeatedly declined to give preclusive effect to state court decisions which encroach upon areas of exclusive federal jurisdiction.[12] Thus, the court of appeals below correctly required enforcement of the FERC certificate pursuant to Section 7(h), despite ONG's attempted "end run" around the exclusive federal statutory framework.[13]

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[12] *See, e.g., Brown v. Felsen*, 442 U.S. 127, 134-39 (1979); *Kalb v. Feuerstein*, 308 U.S. 433, 438-44 (1940); *Southern Union Co. v. FERC*, 857 F.2d 812, 816 (D.C. Cir. 1988), *cert. denied*, 58 U.S.L.W. 3526 (Feb. 20, 1990); *Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96, 111-15 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1528 (1989); *Cullen v. Margiotta*, 811 F.2d 698, 732 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987); *A.L.T. Corp. v. Small Business Admin.*, 801 F.2d 1451, 1455, 1462-63 (5th Cir. 1986); *Andrea Theatres, Inc. v. Theatre Confections, Inc.*, 787 F.2d 59, 63 (2d Cir. 1986) (citing *Lyons v. Westinghouse Elec.*, 222 F.2d 184 (2d Cir.) (L. Hand, J.), *cert. denied*, 350 U.S. 825 (1955)); *Eichman v. Fotomat Corp.*, 759 F.2d 1434, 1437 (9th Cir. 1985). *See generally* 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* §§ 4428, 4469-70 (1981 & Supp. 1989).

ONG errs in suggesting (Pet. 26-27) that *Kalb* may have lost its vitality. This Court specifically relied on *Kalb* as recently as *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 388, 393-94 n.11 (1986). Indeed, the rationale of *Kalb* has particularly strong application to the facts of this case, where there is a "need to protect actual pending federal proceedings" before FERC, on direct review of the certificate, and in the Section 7(h) enforcement proceedings. 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4428, p. 285 (1981 & Supp. 1989).

[13] ONG also errs in arguing (Pet. 24-25) that the court of appeals was required to give preclusive effect to the state court's indication that it had jurisdiction. Obviously, the state court cannot, merely by claiming jurisdiction, overturn Congress' exclusive scheme for federal jurisdiction under Section 19(b) of the Natural Gas Act. The state court's jurisdictional finding is entitled to no

Nor does *Rooker* compel a different result. The court of appeals merely safeguarded Williams' ability to exercise its Section 7(h) eminent domain authority. The court did not purport to assert appellate review over the state court decision. *Rooker* does not prevent the federal courts from granting federal statutory remedies under the Natural Gas Act's exclusive scheme where, as here, the state court's decision is not entitled to preclusive effect. *See* 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* §§ 4469-70 (1981 & Supp. 1989). Moreover, as the court of appeals explained (Pet. App. 18a-21a), the state court injunction violated the principles of comity and federalism that underlie *Rooker*. The court of appeals' holding in this regard is reinforced by FERC, which stated that the state court injunction constituted a serious impediment to federal authortiy (Resp. App. 44a-47a). Accordingly, the court properly refused to allow *Rooker* to "shield" the state court's interference with the Natural Gas Act's exclusive framework for the review and enforcement of FERC orders (Pet. App. 20a).[14]

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more preclusive effect than its substantive holding. *See* pp. 18-19, *supra*. In any event, preclusive effect is particularly inappropriate here. Williams and PowerSmith repeatedly argued in state court that ONG's claims were an impermissible collateral attack on the FERC certificate orders, which the state court lacked jurisdiction to entertain. The state court did not even address these important concerns involving exclusive federal jurisdiction (Pet. App. 28a), but at most might be deemed (Pet. 22-23 n.20) to have rejected them by its silence.

[14] This same reasoning demonstrates ONG's error in relying (Pet. 24) on *Younger v. Harris*, 401 U.S. 37 (1971). This case presents the opposite of the concerns at root in *Younger*. Here, a state court impermissibly disregarded an exclusive federal statutory scheme in an attempt to veto the results of national energy policy as determined by FERC. The principles of federalism and comity, articulated in *Younger*, operate here to protect the integrity of this exclusive federal framework, just as in other cases they operate to protect the integrity of legitimate state litigation.

Finally, ONG errs in arguing (Pet. 26-27) that this Court should grant review in order to clarify unsettled questions. As is evident from the cases cited above (pp. 19-20, *infra*), there is no conflict or confusion in the decisions of this Court or the lower courts on these issues. Indeed, this Court recently denied certiorari in *Consolidated Oil & Gas, Inc. v. Southern Union Co.*, 58 U.S.L.W. 3526 (Feb. 20, 1990), which is referenced in ONG's petition (Pet. 28 n.23). This case presents even stronger reasons than *Consolidated* for denying preclusive effect to a prior state court decision, because the latter case did not involve the collateral attack and *in rem* principles given effect here. In any event, *Consolidated* merely provides further indication that the lower federal courts have properly and uniformly resolved the relevant issues, and that certiorari should be denied here as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 14, 1990

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APPENDIX A

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. CP89-93-000

WILLIAMS NATURAL GAS COMPANY

MOTION TO INTERVENE, PROTEST AND MOTION TO DISMISS OF OKLAHOMA NATURAL GAS COMPANY, A DIVISION OF ONEOK INC.

[Filed Nov. 29, 1988]

Pursuant to Rules 214 and 211 of the Federal Energy Regulatory Commission's (Commission's) Rules of Practice and Procedure (18 CFR §§ 385.214, 385.211), Oklahoma Natural Gas Company, a division of ONEOK Inc. (ONG) respectfully submits this Motion to Intervene, Protest and Motion to Dismiss in the above-captioned proceeding.

I.

Communications and correspondence with regard to this motion should be addressed to:

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II.

Oklahoma Natural Gas Company, a division of ONEOK Inc., is a Delaware Corporation authorized to operate in Oklahoma. ONG is a gas public utility engaged in furnishing natural gas service to more than 265 communities in Oklahoma, serving in excess of 644,000 residential, commercial, and industrial customers. Its utility operations and its rates, services, practices and charges in connection therewith are subject to regulation by the Oklahoma Corporation Commission.

Williams Natural Company (Williams) is an interstate natural gas pipeline company subject to regulation by the Commission.

The PowerSmith Cogeneration Project Limited Partnership (PowerSmith) is a Delaware limited partnership which is constructing a 106 MW combined topping-cogeneration plant near the Firestone Tire and Rubber plant located in Oklahoma City, Oklahoma.

III.

Description of the filing

On October 28, 1988 Williams filed an application in the above-named docket pursuant to Section 7(c) of the Natural Gas Act (NGA) and Part 157 of the Commission's Regulations for authorization to construct, own and operate approximately 12.4 miles of 12-inch diameter pipeline with related facilities in order to connect its existing facilities, located in Cleveland County, Oklahoma, with a new cogeneration power plant which PowerSmith is constructing in Oklahoma County, Oklahoma and for approval of a special rate relating to the transportation by means of this line. Williams states that the facilities would be used to render gas transportation service on behalf of Ladd Gas Marketing, Inc. (Ladd) and PowerSmith pursuant to a Transportation Service Agreement, (hereinafter referred to as the Agreement, and attached

as Exhibit I to the Application) executed September 19, 1988. The facilities are estimated to cost $2,373,700.

The Agreement provides for the transportation of up to 27,400 Mcf/day on an interruptible basis to be received "at any available receipt point located on WNG's system not upstream of the interconnect between WNG's 16-inch Cement Line and its 20-inch Blackwell South Line and delivered at the PowerSmith Cogeneration Plant delivery point. The agreement is for a term of 15 years from the date of initial deliveries and can be extended for up to three additional five year periods thereafter." (Application, p. 4).

IV.

ONG's Position

ONG opposes Williams' filing for the reasons expressed in the remainder of this pleading and moves that the Application be dismissed.

V.

Basis of Opposition

1. *Background*

Williams has filed an application to construct, own and operate certain facilities. It proposes to use those facilities and, pursuant to its blanket certificate authorization, to transport gas on behalf of Ladd and PowerSmith.

Its application under Section 7(c) of the NGA requires that Williams prove that the public convenience and necessity requires the construction of these facilities. To justify the issuance of a certificate, it has the burden of establishing the market, supply, financing and other factors required to support a finding of public convenience and necessity,* including a finding that there is no better

* Williams has not sought a certificate pursuant to this Commission's Optional Expedited Certificate procedure under Section 157.100 *et seq.* of the Commission's Regulations. It will assume no risks, since Ladd has the obligation to pay all facility costs (*infra*). It must, however, carry its Section 7(c) burden.

alternative to provide the same service. *City of Pittsburgh v. F.P.C.*, 327 F.2d 741, 751 (1956).* Furthermore, Williams must demonstrate that this proposal is subject to this Commission's jurisdiction.

While Williams estimates the cost of the facilities to be approximately $2.4 million, and has developed its Exhibits N and P to the Application on such assumption, under the terms of its Agreement, the facilities could cost up to $3.3 million. (Exhibit C to the Agreement). *Furthermore, Ladd is obligated to pay for the pipeline over a 3-year period.* Thus, at the end of such period, Ladd will at least economically, if not in name, own that line.

The plant is to be constructed by General Electric Company. PowerSmith will install General Electric Company gas turbine units to generate the steam and power in the cogeneration plant. Furthermore, while no gas purchase contract has been submitted, it is clear that PowerSmith has contracted with Ladd to purchase the gas necessary to fuel the plant. Not incidentally, Ladd is a wholly owned subsidiary of General Electric Company.** Under the terms of the Agreement, it appears that virtually all of the gas which will be delivered to Williams will be produced in the State of Oklahoma. The gas is proposed to be "transported" on an interruptible basis from a list of available receipt points on Williams' system as set forth in the Agreement "not upstream of the interconnection between Company's 16-inch Cement pipeline and its 20-inch South

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* "The existence of a more desirable alternative is one of the factors which enters into a determination of whether a particular proposal would serve the public convenience and necessity. That the Commission has no authority to command the alternative does not mean that it cannot reject the proposal." (*Id.*)

** The individual signing the contract for Ladd is Ronald G. Spence, who is President of Ladd Petroleum Corporation, which is a wholly owned subsidiary of General Electric Company. See General Electric Company's 1987 Annual Report.

of Blackwell pipeline." (Exhibit C to the Agreement, p. 8). From review of the list in Exhibit A to the Agreement, it is apparent that the gas purchase agreement requires Ladd to use Oklahoma gas. No specific gas supply reserves or volumes are dedicated to the Agreement. Exhibit C to the Agreement makes reference to a "Gas Sales Agreement between Ladd and Firestone Cogeneration Joint Venture dated August 7, 1987." Although obviously critical to an analysis of this Application, the relationships between the parties and ultimately the alleged public convenience and necessity to be served by this pipeline, no such agreement is made part of this Application.* There is no evidence that Ladd—apparently a marketing company, or broker—has real access to *any* gas reserves or supplies. This is a serious omission when it is essential that this cogeneration plant have approximately 27,400 Mcf per day (the transportation capacity of Williams' proposed facilities), for at least fifteen years. Ladd's capability to guarantee a gas supply has not been demonstrated in this Application.

Under the Agreement, Section 6 (p. 8), PowerSmith has agreed to "only include in this Agreement and use the receipt points on Company's system that are not upstream of the interconnection between Company's 16-inch Cement pipeline and its 20-inch South of Blackwell pipeline. . . . The gas in Company's pipelines at that interconnection point currently flows in a northerly direction." Notwithstanding such agreement, a review of the flow diagram in Exhibit G and the location of facilities map in Exhibit F to the Application shows that the gas which actually is going to supply the PowerSmith Cogeneration

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* ONG understands that a contract of that date was entered into between Ladd Petroleum Corporation and Firestone. The details are not available publicly. There is *no* evidence in *this* proceeding that either Ladd or Ladd Petroleum Corporation has a competent gas supply able to meet PowerSmith's requirements over a long term, which may be as long as thirty years.

Plant must be located west of the intersection of Williams' main line and thus the gas *must* come from fields located upstream of the interconnection point in Oklahoma. Williams will construct its 12.4 miles of facilities from a point of delivery on Williams' gathering system west of the interconnection for delivery to the plant. The gas will flow in an easterly direction to the point of interconnection.

Williams anticipates that it will transport the volumes of gas at 90% of contract maximum (Exh. P to the Application). However, in its cogeneration application in Docket No. QF86-36-000, attached to the Application as part of Appendix E, PowerSmith's predecessor, Firestone Cogeneration Project Limited Partnership, showed that it would operate the plant 44.32 weeks per year on a seven day week twenty four hour day basis. This equates to operation at 85.32% of contract maximum rather than 90%. This affects the economic calculations.

The gas supply, purchased, theoretically, from Oklahoma sources from Ladd, would be delivered by Williams through this new 12.4 mile lateral running from its gathering facilities in Oklahoma. And the gas would be delivered to the PowerSmith plant without having crossed any state lines.

The rate Williams proposes to charge for the transportation service is the sum of its interruptible transportation service (ITS) rate and the proposed X-23 rate, as approved by the Commission, subject to a maximum contractual rate of 17.4¢ per Mcf (including GRI and ACA charges, but excluding gathering and fuel charges) plus ½ of new transportation components that may be added in the future.

Exhibit N to the Application projects revenues for three (3) years for Williams. Neither in this Exhibit nor in the remainder of the Application is any explanation given of what happens after Ladd pays for the pipeline after

three (3) years. Williams further states that in order to meet the contractual maximum rate it will discount not the X-23 rate, but its ITS rate. This discriminatory discounting may affect other Williams' customers. Furthermore, not discounting the X-23 rate only helps Ladd as the transportation revenues received by Williams from Ladd will serve to reduce the amount Ladd will have to pay Williams at the end of three (3) years. See Section 8 to Exhibit C of the Agreement.

The *maximum* rate is 27¢ per MMbtu, which includes all charges by Williams. Nonetheless, by contract, the transportation rate to be paid by PowerSmith *will be 27¢*. (Exhibit C to the Agreement, p. 14). The rate to be paid for the gas to Ladd is not specified. Thus at the present, Williams has not provided the Commission the means to determine whether the proposal is in the public interest.

The proposal provides that as long as it can provide it, transportation for 100% of PowerSmith's requirements must be by Williams, thus limiting any possible competition for the life of the Agreement.

2. *This Transaction is Subject to Local Rather Than Federal Jurisdiction*

Unlike many bypass cases which have been presented to this Commission, the facts in this case, as set forth by Williams, demonstrate that the proposal, notwithstanding that it is cast as an application to expand service by an interstate pipeline, in fact relates to service in the nature of distribution or intrastate transportation. While there may be facts which are in dispute as to certain other aspects of this proceeding, there is no dispute about the following:

1. The gas which will serve the PowerSmith Cogeneration Plant originates in Oklahoma.

2. The gas will be delivered to PowerSmith in Oklahoma.

3. The gas delivered to PowerSmith will *never* cross state lines.

4. The facilities to be constructed are all in Oklahoma; they do not cross a state line.

5. The facilities are attached to Williams' facilities which have not crossed state lines, are all in Oklahoma and which effectively provide gathering of gas from various fields to be delivered to Williams transmission pipeline. None of the gas will have moved from a point out of the State of Oklahoma at the time it is delivered to PowerSmith.

6. The parties affected by the transportation and sale of this gas are all Oklahoma parties. The producer, the end user, the local distributor which is franchised in the area and its consumers, who will not obtain the benefit of this load, are all Oklahoma oriented.

This particular project is not in interstate commerce, which Section 7(c) of the NGA defines as commerce "between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof . . ." As this Commission recognized in *Columbia Gas Transmission Company*, 58 FPC 331, 337 (1977): "It is the transportation and sale of *natural gas* across a state line which is the basis for all Commission jurisdiction. It does not require a strained reading of the plain language of the Act to conclude that the flow of gas (rather than the flow of dollars, or revenues or impact of curtailment) across state lines is an indispensible nexus to establishment of Commission jurisdiction." The gas which is delivered to PowerSmith does not and indeed cannot cross a state line.* Logic dictates that if any agency has jurisdiction here, this particular transaction is subject to local regulation rather than that

* "Where, as here, the gas does not and indeed cannot cross a state line even as commingled, there is no basis for establishing Commission jurisdiction." (*Id.*)

of the FERC. See *Natural Gas Pipeline Company of America*, 40 FERC ¶ 61,119 (1987), discussed *infra*.

The gas is proposed to be delivered at the pressure required by the customer, not Williams. As with any distribution company customer, the service being provided is that which the customer needs and demands, not what Williams, in operating its system believes it can accommodate. Just as when ONG provides service at pressures requested by its customers, Williams is providing service at the pressure and in the volumes which PowerSmith seeks. Sometimes a customer wants gas at 5# psia pressure; sometimes 50#; sometimes 350#. But, when delivered at a local level, as it will be here, at pressures sought by the user, *it is being distributed to that customer.* Furthermore, this pipeline serves no interstate function and does not enhance interstate operations since Williams' interstate pipeline will continue to operate as it always has with or without this distribution spur line. Under the terms of the Agreement Ladd has agreed to only include receipt points "not upstream of the interconnection . . ." By contract, the points of receipt are downstream or otherwise "not upstream of the interconnection." The gas used to supply the plant, notwithstanding the contract, *must* come from points upstream of the point of interconnection with the plant because the flow of the gas is easterly into the north-south line.*

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* See Attachment A which is a copy of a flow diagram sheet filed by Northwest Central Pipeline Corporation (now Williams) on July 15, 1986 pursuant to Section 260.8 (Format No. FERC 567) of the Commission's Regulations under the Natural Gas Act. The flow map shows the system in the location of the transaction proposed herein. The 12.4 mile pipeline will tap in to the Williams' 16-inch line which connects with gas supplies gathered from the East Niles Field in Canadian County, the Cement Field in Caddo County, the Sterling Field in Comanche and Stephens County, Oklahoma as well as the Southwest Pocasset Field in Grady County and other fields along the route of the gathering system. The pipe which gathers this gas ultimately connects with the Williams north-south line in Cleveland County *east* of the point of interconnection with the PowerSmith line (see Exhibit F to the Application).

The contractual agreement that the gas be received from Ladd at points "not upstream" of the point of interconnection* does not change the fact that all of the gas to be used in the plant physically will come from Oklahoma points upstream of the plant. *Cf. California v. Lo-Vaca Gathering Co.*, 379 U.S. 366, 396 (1965): "We said in *Connecticut Light & Power Co. v. Federal Power Comm.*, 324 U.S. 515, 529 . . . 'Federal jurisdiction was to follow the flow of electric energy an engineering and scientific, rather than a legalistic or governmental, test.' And that is the test we have followed under both The Federal Power Act and The Natural Gas Act . . ."

Accordingly, the situation here is significantly different than in the usual interstate pipeline application. The gas to be delivered will be produced entirely within Oklahoma. The gas is delivered in Oklahoma before it is ever commingled with any other gas stream. The facilities which are to be constructed are off of the natural gas company's gathering system within the State of Oklahoma and the gas is delivered to PowerSmith for consumption entirely within the State of Oklahoma.

ONG does not suggest that an interstate natural gas company is not seeking to construct facilities here. Obviously, Williams is doing so. However, the facts in this particular case are unique and dictate that the facilities extend from Williams' gathering system, rather than its interstate pipeline system and that the facilities are being used to distribute gas. As such, the facilities are local in nature and should be subject not to FERC jurisdiction, but rather to local regulation, because it is transportation as an intrastate pipeline and it is local distribution.

Adding emphasis to this particular situation is the unique structure of the Agreement between Williams, PowerSmith and Ladd (see Exhibit I to the Application). As shown in Section 8 of Exhibit C to the Agreement,

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* As shown in Exhibit A to the Agreement, virtually all of those receipt points are in Oklahoma.

Williams will construct the facilities necessary to connect its system to the PowerSmith Plant. *Ladd* agrees to pay to Williams "the total amount of out-of-pocket costs actually incurred by Company in connection with construction of these pipeline facilities . . . including fees . . . and reasonable outside legal fees, plus a reasonable allocation for overhead and administrative expenses (out-of-pocket facility costs) . . . not to exceed $3.3 million." The transportation rate monies which are paid for three years "shall be applied to Ladd's payment for the out-of-pocket facility costs." Should the transportation charges which are paid by Ladd over the three year period be less than the out-of-pocket facility costs at the end of the period, Williams "will invoice Ladd for the amout of the unpaid out-of-pocket facility costs and Ladd will pay to Company within thirty (30) days after receipt of such invoice the unpaid out-of-pocket pipeline facility costs." Even if the Agreement should be terminated, Ladd is liable to pay Williams for its out-of-pocket costs. It is of interest to note that Williams has indicated that it will not discount the X-23 rate. As noted earlier, this procedure helps only Ladd, as it reduces the amount Ladd pays to Williams at the end of the three year term. It cannot help either PowerSmith or Williams' other customers.

The net result is that after three years, Williams will have absolutely no investment in the facilities which are to be constructed. From an economic perspective, the facilities will belong to Ladd. Left open is the question as to what payment thereafter will be made by Ladd or PowerSmith for the use of the facilities, which by that time will have a zero rate base.

Left open also is whether it is the present intent of the parties to transfer the fully paid for properties to Ladd once the three year term is over.* If that *is* the basic

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* Experience dictates that if a company had paid for goods once it will not wish to pay for them again. In this competitive world,

intent and Williams intends to sell the property to Ladd —an aspect of this proceeding which warrants investigation—then it would appear that the request for a certificate pursuant to Section 7(c) of the Natural Gas Act is an improper use of FERC and NGA authority to accomplish private purposes. It would be nothing short of a subterfuge, if true, since the certificate, if issued, would have the specific purpose of allowing the interstate pipeline to utilize Section 7(h) of the Natural Gas Act for condemnation purposes.* No intrastate pipeline, LDC or private corporation would have a similar right. And yet the nagging and unanswered question remains: Why else would an interstate pipeline, rather than the customer itself, be allowed to construct a facility, with no risk whatsoever, since the entire cost, including fees, would be paid to Williams by Ladd in three years, and nonetheless, theoretically at least, the pipeline would be entitled to recover revenues for transportation purposes.

ONG submits that a proper analysis of this transaction leads to the conclusion that intrastate transportation and/or distribution is proposed and that the facilities are intended to be part of an *intrastate* transportation distribution operation, if not at the present, then ultimately.

In a case which is similar to the instant proceeding, *Natural Gas Pipeline Company of America*, 40 FERC ¶ 61,119 (1987), the Commission found that the Commission had no jurisdiction where an industrial company was constructing two pipelines, one 36 miles long and

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such double payment leaves in question why such a payment would be made, or whether Williams intends to abandon the facilities by transfer to Ladd after three years.

* Section 7(h) was designed to assure that interstate pipelines which serve a broad public interest purpose could be built. This proposal would permit the construction of facilities which would permit the distribution of gas to only one customer.

the other 39 miles long, to connect with an interstate pipeline since the pipeline would lie wholly within the state and connect industrial plants in the same State as the interstate pipeline. See also, *Colorado Interstate Gas Company*, 49 FPC 648 (1973). In those situations, the lines were considered *not* subject to FERC jurisdiction. Similarly, in this situation, the facilities, if constructed from the tap on Williams' line by Ladd or PowerSmith, would not be subject to FERC jurisdiction. Since Ladd is paying for these facilities within three years, for all intents and purposes, Ladd is building the facilities. Under the circumstances surrounding this application, the facilities are not subject to FERC jurisdiction. This is a local matter which should be subject to local regulation. Ladd/PowerSmith should not be indirectly handed the right to condemnation simply by having Williams construct the facilities.

This case cries out for local, not federal, regulation. The delivery is to a single market—at least at present—which is in the heart of ONG's service territory. In its brief in *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), responding to arguments of the state commissions that encouraging bypass is harmful to ratepayers on the LDC's systems, the FERC assured the Court that "the states have ample authority to regulate interstate pipeline services that bypass distributors." Even if the service here were construed as "interstate pipeline service", the state commission must have jurisdiction to protect ratepayers. The fundamental purpose of the NGA is to protect consumers. If jurisdiction is to be asserted by this Commission (although we believe it should not be), it must be for the purpose of investigating the nature of the proposals, for determining if there are private unexplained arrangements which have been entered into which change the nature of the public proposal. At the minimum, a hearing is essential to look into the questions which have been propounded.

3. *ONG Provides a Better Alternative*

ONG has been distributing natural gas throughout the State of Oklahoma, including Oklahoma City, for many years. Its gas distribution system extends throughout Oklahoma City and within reach of the PowerSmith Cogeneration Plant. Unlike Ladd, ONG can *assure* a gas supply from Oklahoma sources which can meet the requirements of the plant at reasonable prices. This has been demonstrated in its annual reports * and, given the opportunity in a proceeding here, ONG would show the adequacy of its gas supply—which Ladd has yet to show is available to it.** ONG's rates are subject to regulation by the Oklahoma Corporation Commission and thus would give rate stability to PowerSmith over the long term. It should be noted that the options to extend the contract for three additional five year periods depends upon *mutual agreement*, which inevitably will mean higher costs.

ONG will show that if it is allowed to serve PowerSmith, ONG's other consumers will benefit. No such showing has been or can be made by Williams in this proceeding. ONG will show that the investment in plant which it will make to connect to the PowerSmith cogeneration plant is significantly less than the minimum of $2.4 million proposed by Williams. Thus, economies will be engendered by having ONG provide the service. ONG

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* As shown in ONEOK Inc.'s 1987 Annual Report to Stockholders, its reserve life index exceeded seventeen (17) years.

** A fundamental and long-standing requirement under Section 157 of the Commission's regulations is the demonstration of an adequate gas supply to support the proposal. See Section 157.14 (a)(10); *Kansas Pipe Line & Gas Company*, 2 FPC 28 (1939): "We are of the opinion that applicants who contend that 'public convenience and necessity' require or will require the construction of facilities for the transportation of natural gas must show that they possess a supply of natural gas adequate to meet those demands . . ." 2 FPC at 40.

will show that because it has a gas distribution network in and around Oklahoma City and the PowerSmith plant, it can provide a more assured service than anyone else. ONG is confident—and has good reason for this confidence—that its current burner tip rate to PowerSmith would be less than that incorporated in the Williams-Ladd-PowerSmith arrangement. If the difference were only 10¢ per MMBtu, PowerSmith would have $900,000 in the first year alone.

ONG has sought to find a reason why PowerSmith chose not to deal with it rather than Ladd. It is possible that the tie between General Electric's producer subsidiary, Ladd, and its investment in the construction and furnishing of gas turbines in the cogeneration plant, effectively have foreclosed competition. Since Ladd will be supplying the gas to meet the load to be served by the General Electric construction plant, there is a guarantee that it will have income and cash flow from gas sales. ONG has no certain knowledge that there is a tie between PowerSmith purchasing that gas from Ladd and the contract to construct the cogeneration plant or to supply the gas turbines. Given the opportunity, after this matter is set for hearing, it is expected that this question will be investigated. Without that investigation, the Commission and its Staff will have no opportunity to determine whether, as a result of the affiliate relationship, there has been, in fact, improper action by the parties. Following the analysis of the potential for preclusion of competition by pipelines' marketing affiliates, this Commission adopted a market affiliates rule, which is designed to preclude that from happening.* In this case, where the potential for similar harm is noted, the Commission must not ignore it.

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* Inquiry into Alleged Anticompetitive Practices Related to Marketing Affiliates of Interstate Pipelines, Order No. 497, issued June 1, 1988.

4. *Competitive Requirements Demand That The Application Either Be Rejected Or Set For Hearing*

It is beyond cavil that this Commission favors competition. In a series of orders, even before Order No. 380 was issued in 1983, until this time, the Commission has repeatedly taken steps to remove bars to competition. Indeed, the Chairman of the Commission has been quoted as complaining that distributors are "the last bastion" against free and open competition. But in this proceeding the parties are eliminating competition.

Section 10 of Exhibit C of the Agreement restricts transportation service competition by providing that "one hundred percent (100%) of the gas requirements of the PowerSmith Plant subsequent to the Initial Date of Commercial Operations" should be by Williams. This provision precludes *any* possible competition by ONG or others which may seek to provide less costly and more secure transportation in the future for any gas requirements of the plant. This provision surely violates this Commission's policy for free and open competition. In Order No. 380, the Commission stated: "Indeed, it has been made clear that fostering competition is not only an appropriate goal but must take a high priority in the values which the Commission considers when it determines whether rate structures are just and reasonable."

This proceeding provides the opportunity for this Commission to show that it means what it has been saying and that local distribution companies will be given the same chance to compete which they have been accused of depriving to others.

5. *Questions Which Must Be Answered*

1. Who will own the pipeline after three (3) years? If Ladd will own the pipeline, is this application not a subterfuge to obtain Federal condemnation authority?

2. Once Ladd pays for all of the costs of the pipeline what rate will Williams charge?

3. What effect will this transaction have on other Williams' customers?

4. Was competition stifled where General Electric Company, supplier of the gas turbines, owns the company that contracted to supply the gas?

5. Is a requirement to transport all gas to the plant under the transportation agreement violative of Commission policy on competition?

6. If Oklahoma gas is consumed by an Oklahoma customer through a discrete pipeline is local distribution involved?

7. Are not these facilities really local, intrastate transmission and distribution facilities?

8. Why allow discriminatory discounting of rates (the ITS rate) when the only party which will benefit from such transaction is a gas broker?

9. Is there a more feasible alternative represented by ONG's readiness, willingness and ability to provide more efficient and less costly service to PowerSmith?

10. If there is such a more feasible alternative, how can this Commission certificate the proposal by Williams?

On the basis of the foregoing, it is clear that ONG has a substantial interest in this proceeding which will be directly affected by any action ultimately taken by the Commission herein. ONG submits that its interests cannot be represented by any other party, and that it has the right to intervene herein.

WHEREFORE, ONG respectfully moves that (1) it be permitted to intervene with all rights of a party, (2)

the Commission dismiss this application, or (3) failing dismissal, the Commission set this matter for hearing.

Respectfully submitted,

OKLAHOMA NATURAL GAS COMPANY
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Its Attorneys

Dated: November 29, 1988

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. CP89-93-000

WILLIAMS NATURAL GAS COMPANY

REQUEST FOR REHEARING OF OKLAHOMA NATURAL GAS COMPANY, A DIVISION OF ONEOK INC.

[Filed March 1, 1989]

Pursuant to Rule 19(b) of the Natural Gas Act and Rule 713 of the Commission's Rules of Practice and Procedure, Oklahoma Natural Gas Company, a Division of ONEOK Inc. (ONG) requests rehearing of the Commission's order of February 16, 1989, which granted Williams Natural Gas Company (Williams) a Section 7(c) certificate of public convenience and necessity to construct and operate facilities to transport gas through a 12-mile pipeline in Oklahoma.* ONG has moved contemporaneously herewith for an immediate stay of that order pursuant to 5 U.S.C. § 705 in order to prevent irreparable injury while the Commission considers the rehearing request.**

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* ONG respectfully incorporates herein (1) its Motion to Intervene, Protest and Motion to Dismiss, filed November 19, 1988, (2) its Supplement to Protest, filed January 18, 1989, and (3) its Motion to Compel Responses, filed February 3, 1989. Repetition of the arguments set forth therein would unnecessarily increase paper. ONG nonetheless submits that those arguments continue to be valid.

** Should the Commission deny rehearing, ONG has requested that the stay continue until court action has been completed.

I.

SPECIFICATION OF ERRORS

In its Order of February 16, 1989, the Commission erred in the following respects:

1. The Commission erred in failing to find that the facilities proposed to be constructed and the transportation provided thereby are matters of local interest which are not subject to Commission jurisdiction, but rather are subject to the jurisdiction of the Oklahoma Corporation Commission (OCC).

2. The Commission erred in its ruling that the public convenience and necessity requires granting Williams a certificate.

3. The Commission erred in failing to set this matter for hearing.

4. The Commission erred by failing to defer to the request of the OCC to hold hearings in order to determine the jurisdictional questions involved here and to resolve other factual matters.

5. The Commission erred by failing to investigate issues raised by ONG and by failure to obtain pertinent information available only to the applicant, the end-user, and the broker involved in the transaction, when the applicant refused to provide such information to ONG.

6. The Commission erred by its failure to investigate whether the intent of the parties ultimately is to transfer title to the 12-mile line to Ladd Gas Marketing, Inc. (Ladd) or PowerSmith Cogeneration Project Limited Partnership (PowerSmith) and thus whether the sole purpose of the certificate is to obtain condemnation rights under Section 7(h) of the Natural Gas Act and, if so, to find that the Commission's process is being abused.

7. The Commission erred by failing to ascertain why the parties entered into option agreements providing for

alternate construction schemes, clearly of an intrastate nature, *after* Williams had filed its application herein.

8. The Commission erred by failing to require Williams to respond to data requests which would have helped to provide a record upon which pertinent issues could be resolved.

9. The Commission erred in failing to find that there is a better alternative to serve the end-use market proposed to be served by Williams.

10. The Commission erred by finding that there are adequate gas supplies to support the issuance of a certificate of public convenience and necessity herein.

11. The Commission erred by failing to follow established policy, without adequate explanation.

12. The Commission failed to protect the public—as contrasted to private—interest.

II.

SUMMARY OF ARGUMENT

The Commission erred in granting a certificate to Williams by failing to obtain necessary evidence, by relying on the limited information presented and failing to find that there is a better alternative to serve the markets, which benefits all Oklahoma consumers and not just the private parties involved in the Williams, Ladd, Power-Smith deal. The Commission wrongly assumes that simply because a contract was entered into, fair competition which benefits the public existed.

The Commission's failure to determine, develop and examine whether or not fair competition existed in this case is indicative of the Commission's current—and wrong—policy whereby interstate pipeline companies may, with the Commission's blessings, pick off the most lucrative customers of local distribution companies. This policy forces distribution companies, who are required to serve

all who seek service within their franchise areas, to recover fixed costs from a shrinking customer base. Further, the Commission's creation of an apparently irrebuttable presumption that direct service by an interstate pipeline is in the public interest is not consistent with the Commission's past policy pronouncements, nor compelled in any way by federal law.

The Commission erred in failing to find that Williams' proposal is local in nature and not subject to its jurisdiction. All gas used in the transaction will be produced, transported, and consumed within the State of Oklahoma. ONG submits that the Williams facilities involved are, contrary to the Commission's finding, gathering facilities. Whether or not the line is a gathering line is a question of material fact which has not been determined based on any evidence of record. The Commission erred in not holding a hearing to develop further evidence.

The proposed direct natural gas service by Williams to PowerSmith involves the "local distribution of gas," and is beyond the jurisdiction of the Commission. Congress created a dual regulatory scheme that reserved much authority to the state. At some point "interstate" transportation ends and local distribution begins, and, at that point, state jurisdiction, rather than federal jurisdiction takes over. In this way, a state is able "to manage the essentially local aspects of its business."

It is axiomatic that the Commission must hold a hearing when there are material facts in dispute. ONG has raised numerous issues which deal with questions of material fact. The Commission has wide discretion to determine whether or not to set a given matter for hearing, but its actions may not be arbitrary. In this case, the Commission has no factual foundation for its conclusion, and erred in failing to set the proceeding for a hearing to elicit the acts necessary to reach a rational decision.

The Commission erred in failing to defer action in light of a proceeding pending before the Oklahoma District Court in which the Judge has determined that Williams must first obtain a franchise from the City of Oklahoma City in order to construct facilities by use of that city's streets. The action in this proceeding goes directly to the interests of the citizens of Oklahoma City. The Commission should defer its action pending a decision made by the persons who will most be affected by this proceeding.

The Commission erred in failing to follow established Commission policy (1) with regard to its favoring local distribution companies to provide service to local markets, and (2) with regard to providing flexible receipt points for gas transported to a specific market under a Section 7 certificate authorization.

III.

BACKGROUND

This case involves an application by Williams for authorization to construct, own and operate 12.4 miles of 12-inch pipeline in order to connect its existing facilities in Cleveland County, Oklahoma, to a new cogeneration power plant currently being constructed by PowerSmith in Oklahoma City. The facilities would be used to provide transportation service through the pipeline for gas which Ladd would sell to PowerSmith. PowerSmith proposes to use the gas to provide electricity for Oklahoma Gas & Electric Company (OG&E) and steam for Firestone Tire and Rubber Company (Firestone). The proposed facilities would parallel ONG's existing distribution lines and would capture one of ONG's large industrial customers.

IV.

ARGUMENT

The Commission Erred In Finding That the Public Convenience And Necessity Required Granting Williams' Application

The Commission ruled that the public interest will be served by allowing Williams to duplicate ONG's facilities to serve PowerSmith. (Mimeo, p. 11.) In taking this action, the Commission relied primarily upon its "belief that the public interest is best served by allowing the market to determine who will provide service in cases such as this". (*Id.*)

The Commission further found that this proposal will result in benefits "to Ladd, WNG, PowerSmith, Firestone and OG&E". (Mimeo, p. 10.) This was based on the theory that Ladd and Williams would benefit from increased revenues, that PowerSmith will benefit by having "access to competitively priced gas through Ladd" and both OG&E and Firestone would benefit because OG&E would have a new source of "reasonably priced electricity and Firestone will be able to operate its tire manufacturing processes more efficiently by using the steam produced by PowerSmith". It also found that Williams' customers will also benefit and that operation of the cogeneration plant would bolster Oklahoma's economy, benefitting the residents of the state. There is no record evidence to support any of these conclusions.

In making these findings, the Commission failed to recognize that the cogeneration facility would be built and serviced by gas, quite likely at a lower cost than under the approved arrangement, even if the certificate were to be denied. Thus, the alleged "benefits" to OG&E and Firestone, as well as to Oklahoma's economy and the residents of the state, will not be enhanced by the fact that Williams, rather than ONG, is transporting the gas

to serve the PowerSmith plant. There is no showing that OG&E will purchase power from PowerSmith at any savings to OG&E. Under the Public Utility Regulatory Policies Act of 1978, the rate cannot exceed "the incremental cost to the electric utility of alternate electric energy". See 16 U.S.C. § 824a-3(b), *i.e.*, its full "avoided cost", 18 C.F.R. § 292.304(b)(2). There is no evidence in this record to show what price will be paid or what "savings" there will be to OG&E and its consumers.

In this regard, ONG has attached hereto, for the information of the Commission, a January 5, 1989 order of the Corporation Commission of the State of Oklahoma (OCC), together with a dissenting opinion dated January 20, 1989, and special concurring opinion of the Chairman of the OCC. That order makes clear that OG&E has no need for the power to be made available by PowerSmith. The Commission found "that it appears no additional capacity is required on the OG&E system until 1995, at the earliest; and that only peaking capacity would be needed at that time. . . . The Commission further finds that until such time as additional capacity is determined to be needed on OG&E's system, OG&E's maximum avoided costs are energy related only" (pp. 15-16).

In the Commission's rush to judgment in this proceeding, allegations were accepted as fact, leading the Commission to reach conclusions which are inaccurate. Had a hearing been held, evidence concerning OG&E's needs and alleged benefits to it and the consumers it serves could have been investigated. On the face of the OCC's recent order, it would appear that no benefits will accrue to OG&E. It does not now need the capacity PowerSmith will provide and, if maximum avoided costs "are energy related only", there will be no savings at all to OG&E—and questionable benefits to PowerSmith. We note that the PowerSmith-OG&E agreement, referred to in Williams' application (p. 3) is not part of the record evidence upon which the Commission apparently relied.

To the extent ONG could provide gas to PowerSmith at a lower rate than under its deal with Ladd and Williams, as ONG has alleged it could do, there would tend to be greater benefits—if there are any—to consumers in Oklahoma because both gas and electric savings would be engendered.* There is no evidence of any increased efficiency by Firestone because of receipt of steam from PowerSmith. Allegations and assumptions, without any factual foundation do not support the conclusion reached by the Commission.

The benefits to PowerSmith, Ladd and Williams are evident. They will make money out of this. The Commission totally ignores the detriments that will be imposed upon gas consumers throughout the state because ONG's market will be bypassed. ONG will lose the Firestone market, which up until this time has helped to pay the fixed costs incurred by ONG in providing service to markets throughout the state. ONG will lose the potential of serving the PowerSmith plant, which would further help to spread ONG's fixed costs over more units of gas, thus benefitting gas consumers throughout the State of Oklahoma. And, since the Commission refused to hold a hearing in this proceeding, the Commission has no basis to weigh the comparative benefits and detriments. The conclusory statements made by the Commission at pp. 10-11 have no substantial evidentiary support.

As to the Commission's position that "it is reluctant to shield local distribution companies from the forces of competition, which we have attempted to foster in the natural gas industry" (mimeo, p. 11), here the Commission simply has succeeded all too well in shielding the natural gas pipeline company, Williams, from the forces of competition. ONG sought to compete but, notwithstanding its willingness to offer at this time services at

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* This assumes that PowerSmith would pass on to OG&E the savings that would result, although there is no assurance, or even likelihood, that this is so.

some 20¢ *less* than would result from PowerSmith's deal with Williams and Ladd, its offer was ignored. No adequate explanation is provided as to why the Williams/Ladd agreement was entered into, and, notwithstanding ONG's attempt to obtain information, no evidence was developed by the Commission which would provide a clue as to the reason for the deal. The Commission simply assumes that because the contract was entered into, competition has played its hand and the public interest is served. When ONG sought to obtain information from Williams through a data request, Williams refused to answer. When ONG moved to the Commission to compel responses to the data request, the Commission simply ignored the motion and thus missed the opportunity to obtain information which would have provided some basis to answer these material factual questions. In other words, the Commission has put its blind faith in a pipeline, Williams—which has taken customers from state regulated distribution companies*—and in the assumption that fair competition, and no other motive, will direct peoples' actions.

The Commission recently has chosen consistently, in its orders permitting bypass, to ignore the impact of any particular bypass on the distribution company, which, by law, must continue to serve all customers in its franchise area at rates regulated by the state commission, as well as on the public served by that company. When a distributor's rates are established, consideration is given to sales or transportation provided to end-users. When those end-users are taken away by interstate pipeline companies, in derogation of a long-standing Commission policy favoring local distribution companies over inter-

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* This is not the only case in which Williams has sought and been successful at the Commission's instance in bypassing local distribution companies which have been committed to serve markets under state law. See, for example, *Kansas Power and Light Company v. Williams Natural Gas Company*, 45 FERC ¶ 61,272 (1988), *reh'g denied*, 46 FERC ¶ 61,—— (February 23, 1989).

state pipelines to provide service*—a policy which has not specifically been overruled by the Commission—the Commission is content to find that distributors have not been competitive and, thus, should lose the load. By these means, pipelines, which are situated near desirable end-use customers, are able to cherry pick, *i.e.*, to pick off the most lucrative end-use customers and leave the remainder to the distribution companies to seek to serve at increasingly higher rates. The Commission finds this to be fair competition and in the public interest. As a matter of policy, this is wrong. As a matter of long-term economics, when the question of market power and its effect on a distributor's ability to compete is considered, this is wrong. As a matter of fact, in this case, this is wrong.

Not only did the Commission fail to follow its long-standing local distribution companies over interstate pipelines to provide service to local markets (*supra*, p. 11), but it also failed to follow its more recently adopted policy concerning the denial of flexible receipt point authority to a pipeline transporting gas for a customer in a Section 7 proceeding. Its approach here is inconsistent with its policy, as set forth in *Southern Natural Gas Co.*, 36 FERC ¶ 61,275 (1986), *Arkla Energy Resources a Division of Arkla, Inc.*, 45 FERC ¶ 61,375, at pp. 62,178-9 (1988), and cases cited there. No explanation has been provided for this gross deviation from existing policy. If this reflects a change in policy, no explanation has been provided as to why such a change has been adopted.

The Commission may be rewriting the script under which the natural gas industry operates on its own economic theories. ONG submits that the theories have not,

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* See *Panhandle Eastern Pipe Line Co.*, 13 FPC 301, *reh. denied*, 13 FPC 1501, *aff'd Panhandle Eastern Pipe Line Co. v. FPC*, 232 F.2d 467 (1956), *cert. denied*, 352 U.S. 891 (1956); *Southern Natural Gas Co.*, 25 FPC 925, 927 (1961); *Panhandle Eastern Pipe Line Co.*, 39 FPC 581, 585 (1968); *Natural Gas Pipeline Company of America*, 34 FPC 771, 783 (1965); *Transwestern Pipeline Co.*, 36 FPC 176, 201 (1966).

in this case, been shown to have any valid basis. There is no evidentiary support for the Commission's conclusions that this kind of competition is desirable. The mere conclusion that this is so does not provide a substantive basis to overrule a policy which has been in effect over a long period of time. By ignoring the need to test these questions on an open record in this case, the Commission has denied ONG an opportunity to be heard in order to show where the public interest lies. ONG has a public ultility duty to serve the consumers in Oklahoma in the most reasonable manner at the lowest reasonable cost. It cannot do so if it is exposed to having its major loads taken by interstate pipelines whose market power allows them to intrude upon essentially local concerns without any consideration of underlying factual matters. In addition to increasing ONG's unit cost of service, loss of loads such as Firestone will tend to increase ONG's exposure to take-or-pay costs, and thus to further burden Oklahoma consumers.*

The Commission's creation of an apparently irrebutable presumption that direct service by an interstate pipeline is in the public interest is not consistent with its pronouncements in its Order No. 436 proceedings, see *Regulation of Natural Gas Pipelines After Partial Wellhead Deregulation*, 50 Fed. Reg. 52217, 52263 (December 23, 1985) (Order No. 436-A), nor is it compelled by any changes in federal law. See *Associated Gas Distributors v. FERC*, 824 F.2d 981, 1045 (D.C. Cir. 1987) (Mikva, Jr., concurring in part and dissenting in part). The Commission, discussing optional expedited certificates (OEC) and protests by State Commissions and local distribution companies (LDC's) that such procedures would lead to bypass of LDC's stated:

> The Commission has frequently exercised its authority over transportation to authorize pipelines in

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* During the one-year period ending January 1989, ONG sold approximately 396,000 Mcf of gas to Firestone.

> interstate commerce to construct and operate the facilities necessary to make direct sales, including transactions involving issues of distributor by-pass. In some instances, the Commission denied requests for direct sales that would by-pass a distributor; in others, it approved the proposal, *depending on the circumstances of the case and the factors bearing on the public interest. The final rule does nothing to change this* . . . .

Order No. 436-A, *supra*. (Emphasis added.)

In upholding the OEC procedures, the Court was comforted by the fact that the presumption created by the Commission in Order No. 436 that certification would be in the public interest was rebuttable. *Associated Gas Distributors v. FERC*, 824 F.2d at 1037.

The Court noted specifically:

> Moreover, the Commission expressly states that in an OEC proceeding it will not allow onto the agenda certain issues formerly cognizable *in § 7 hearings*: duplication of facilities, the problem of cost-shifting in a bypassed distributors rates, or impact on local interests generally. FERC Supp. Brief at 6, 8". (*Id.* at 1032; Emphasis supplied).

The Commission here appears to be putting applications to construct facilities to bypass distributors into the class of OEC certificates, contrary to its announced position to the Court. Here, the issues which the Court noted were "cognizable in § 7 hearings" are some of the very issues ONG has raised. The Commission's change in position is neither fully explained nor is it justifiable.

The policy which the Commission has followed in this case and others* is a departure from the long-standing

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* See *e.g.*, *Kansas Power and Light Company v. Williams Natural Gas Company*, 45 FERC ¶ 61,272 (1988), *reh'g denied*, 46 FERC

practice of the Commission to favor LDC service. There is no substantive record evidence here which supports the 180° turn by the Commission and the rationale provided inadequate. The Commission's ruling simply is not based on reasoned decisionmaking. *Atchison, Topeka & Santa Fe Ry. v. Wichita Board of Trade*, 412 U.S. 800, 808, 37 L.Ed. 2d 350, 93 S.Ct. 2367 (1973) (agency must provide a reasoned explanation for any failure to adhere to its own precedents).

The Commission Erred In Failing To Find that Williams' Proposal Is Purely Local In Nature

In its protest to Williams' application, ONG argued that the facilities proposed by Williams are subject to local rather than FERC jurisdiction. The gas will be produced, sold, transported and consumed in Oklahoma.*

¶ 61,—— (February 23, 1989); *Cascade Natural Gas Company v. Northwest Pipeline Corporation, et al.*, 44 FERC ¶ 61,081 (1988), Order Denying Rehearing in Part and Granting Rehearing in Part, 49 FERC ¶ 61,287 (1988); *Panhandle Eastern Pipe Line Company, et al.*, Opinion No. 275, 39 FERC ¶ 61,274 (1987); *aff'd in part and rev'd in part*, Opinion No. 279-A, 40 FERC ¶ 61,220 (1987); *reh'g granted in part and denied in part*, Opinion No. 275-B, 42 FERC ¶ 61,076 (1988).

* The Commission found (mimeo, p. 8, fn. 15) that "the fact that the molecules of gas actually delivered to PowerSmith will originate in Oklahoma does alter our view" that the lateral will be an essential and integral element of the interstate transportation of natural gas. The Commission thus acknowledged that all of the gas used by PowerSmith will be produced, transported and consumed without ever leaving Oklahoma. The suggestion that "the transportation will be carried out by means of a backhaul arrangement that calls for gas to be delivered to WNG at a number of designated receipt points (some in Kansas and Wyoming) and commingled with the interstate stream of gas in WNG's system", really is of no moment. The *fact* is that none of the gas to be used in *this* transaction will come from any but the limited sources in Oklahoma leading to the new lateral line distributing gas to PowerSmith. The rest is an easy fiction, since none of the gas will be "backhauled" to PowerSmith. The gas is directly hauled to it. And

The Commission found that the facilities proposed by Williams are within its jurisdiction. It found, contrary to ONG's assertion, that the proposed lateral will not be connected to gathering facilities in that it will interconnect with Williams' Cement Pipeline, which, the Commission states, "is a high-pressure 16-inch line capable of transporting large volumes of gas. Its primary function is to transport gas that has been gathered from various fields in western Oklahoma to WNG's interstate system for transmission to points both in and out of Oklahoma".

As shown on Attachment A to ONG's Motion to Intervene, Protest and Motion to Dismiss, the Commission is wrong. The fact that it is a 16-inch line is totally immaterial to the issue of whether this is a gathering line or a transmission line, as is the fact that it is a high-pressure line. The line runs in a west to east direction, picking up gas from the Sterling field, the Cement field, the East Miles field, the Tuttle-East field, and producing wells along the way. The centralized point of delivery is at the Williams main pipeline, which runs in a north-south direction near the Northeast Norman field and is located east of the point of interconnection with the proposed 12.4 mile line. Behind that point, the Williams system serves the function of a gathering system. The Commission has made a finding that it does not, without giving ONG an opportunity at a hearing to demonstrate the fact that it is a gathering system and not a transmission facility. The only evidence of record is the map which ONG submitted and which is not detailed enough to permit a conclusion that it is a transmission line. Indeed, that map would lead to the conclusion that this

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a review of the list of receipt points shows that virtually all of them are in Oklahoma (only 6 of 413 of those receipt points are *not* in Oklahoma—5 in Kansas, one in Wyoming. The "maximum daily quantity" of gas behind those receipt points is extremely minimal). There is no evidence to show that Ladd has any gas behind the six points listed in Kansas and Wyoming, or, for that matter, behind any of the other points.

line serves a gathering function. In a Section 7 certificate case, the applicant has the burden to support its proposal. It did not do so in this regard. Given the opportunity to develop the facts in a proper hearing, ONG would show that the line serves a gathering function. This is critical because if the delivery is made from a gathering line, it becomes even more apparent that the delivery is not in interstate commerce.

In any number of cases, the Commission has found that a high pressure, large diameter line can serve a gathering function.* The fact that this is a 16-inch high pressure line does not predetermine that it is not a gathering line. Whether or not this line is a gathering line is a question of material fact in this proceeding, which has not been determined based upon any evidence of the record.

When enacting the NGA, 15 U.S.C. § 717 *et seq.*, Congress created a dual state-federal regulatory scheme over natural gas. The manifest purpose in enacting the NGA was to close regulatory gaps by complementing and strengthening state regulation. *See Panhandle Eastern Pipe Line Co. v. Indiana Public Service Comm.*, 332 U.S. 507 (1947). Moreover, "Congress did not desire comprehensive federal regulation; much authority was reserved for the States . . . ." *Transcontinental Gas Pipe Line Corp. v. Federal Power Comm.*, 365 U.S. 1, 19 (1961).

Section 1(b) of the NGA, 15 U.S.C. § 717(b) provides:

> (b) *The provisions of this Act* shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or

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* See, *e.g.*, *Shell Gas Pipeline Company*, 41 FERC ¶ 61,032 (1987) (finding 27 mile long, 16-inch diameter, 1350 p.s.i. Pipeline to be gathering).

> sale, but *shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution* or to the production or gathering of natural gas. (Emphasis added.)

Thus, while Congress made sales for resale and the transportation of natural gas in interstate commerce subject to federal regulation, Congress expressly withheld from federal regulatory jurisdiction all other transportation of natural gas.

Since the proposed direct natural gas service by Williams to PowerSmith involves the "local distribution of natural gas," such distribution is beyond the regulatory jurisdiction of the Commission since Congress, under Section 1(b) of the NGA, reserved the same to the States.

The bypass of the existing utility, as proposed in this case, presents a situation of essentially local concern and of vital interest to the State of Oklahoma. As the U.S. Supreme Court has noted:

> It does not follow that because appellant is engaged in interstate commerce it is free from state regulation or free to manage essentially local aspects of its business as it pleases . . . . [S]uch a course would not accomplish the effective dual regulation Congress intended, and would permit appellant to prejudice substantial local interests. *This is not compelled by the Natural Gas Act* or the Commerce Clause of the Constitution.

Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm., 341 U.S. 329, 337 (1951). (Emphasis added).

That this may involve the transportation rather than the sale of gas is of no real consequence, even were this transportation to be considered in interstate, rather than intrastate, commerce. At some point the "interstate"

transportation ends and transportation or distribution in the local market takes place. That may be only for an instant,* but for that time and at that place the transportation is subject to local—OCC—jurisdiction. This approach comports with the scheme of regulation envisioned by the Congress and recognized by the Court in *Panhandle v. Michigan, supra.* In this way, the state is able "to manage essentially local aspects of its business". The Commission has been consistent in finding otherwise (mimeo, pp. 7-8) and the Commission has been consistent in its error. ONG submits that it is time for the Commission to take a fresh look at the question and to recognize that in the federal/state compact, there is a need to recognize the state's interest in protecting *all* of its consumers. There is a need for this Commission to recognize the reason for the policy preferring service to end-users by distributors, which policy was adopted and maintained even though the same potential for "competition" existed in earlier years as exists today. Distributors serve a valid function in providing gas supplies—by sales or transportation—to *all* consumers and not just a select few, and the only way they can do it economically is by continuing to serve large commercial and industrial markets, which pipelines can selectively pick off. The Commission's failure to recognize this need is error.

The Commission Erred In Failing To Set This Matter For A Hearing

It is axiomatic that the Commission must hold a hearing when material facts necessary for the Commission to reach a reasoned decision are in dispute.

ONG has raised numerous issues which deal with questions of material fact. In addition to those discussed

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* See *Transwestern Pipeline Company,* Docket No. RP88-198-006, order issued February 24, 1989 (*mimeo,* p. 11), where the Commission found that a suspension "only for an instant" served the same function as a one-day or five-month suspension.

above, including the benefits vs. detriments to the public of this proposal, ONG has questioned (1) whether the applicant is proposing to obtain the certificate solely for the purpose of obtaining condemnation rights and, if so, whether this is consistent with Commission policy? (2) whether competition was stifled in a situation where General Electric Company, which supplied the gas turbines to PowerSmith, also owns Ladd, the company which is selling the gas to PowerSmith, *i.e.*, whether there was a tying arrangement to these transactions? (3) whether there is a more feasible alternative, presented by ONG's proposal to serve PowerSmith, which better serves the public interest? (4) what was the purpose of option agreements entered into by the parties *after* the application for a certificate was filed in this case? (5) if the Commission had considered the arguments in the supplement to ONG's protest, would the Commission's response have been different? That supplement contained additional information previously not available to the Commission and, because the filing was ignored by the Commission, that information was not before it (see mimeo, pp. 5-6). Can the Commission understand the purport of that additional information if it will not grant a hearing where the effect of it may be explored? (6) is it appropriate to issue a certificate where there is no evidence that there is a gas supply to support the arrangement? The Commission states, in effect, that as long as there is a contract to sell gas by a marketer, the public interest is served. Ignored are questions of (a) security of service, (b) reliance by other consumers on this service, which the Commission has found (erroneously, we believe) to benefit them, (c) what "protection" (mimeo, p. 9) a contract will provide if there is no gas behind it, *i.e.*, will money damages run the PowerSmith plant or serve steam to Firestone or electric power to OG&E? (d) what effect might failure of this project have upon other consumers, if Williams has built the plant and there is no gas to move through the facility? (e) has the Commission effectively rejected its

long-standing policy of requiring Section 7 certificate authorizations for new service to have a gas supply to back them up?*

Each of these questions raises material issues of fact—not policy or law—which should be answered when the Commission acts to protect consumers under its Natural Gas Act powers. The Commission has wide discretion to decide whether or not to set a given matter for hearing; however, its actions may not be arbitrary. If there are material issues of fact, a hearing is required. *Citizens for Allegan County v. FPC*, 414 F.2d 1125 (1969). To meet the requirement that the Commission has engaged in rational decisionmaking, it must demonstrate a "rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Association v. State Farm Mutuals Ins. Co.*, 493 U.S. 43 (1983). In this case, the Commission had no factual foundation for its conclusions. The Commission erred in failing to set this proceeding for a hearing and failed to elicit the facts necessary to reach a rational decision.

The Commission Erred By Failing To Defer Action Pending The Results Of A State Court Case

In Oklahoma Natural Gas Company, a Division of ONEOK Inc. v. Smith Cogeneration, Inc., et al., CJ-88-10533, District Court for Oklahoma County, Oklahoma, a Petition for Declaratory Order is pending in which ONG has sought to establish that Williams must first obtain a franchise from the City of Oklahoma City in order to use that city's streets for the transportation and distribution of natural gas. The Presiding Judge, on February 16,

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* See *Kansas Gas Pipe Line*, 2 FPC 28 (1939). See also Section 157.14(a)(10) Exhibit H—Total gas supply data. While that exhibit is specifically directed to a pipeline's gas supply, it connotes the Commission's concern for new investment in facilities and service to a market being backed by adequate gas supplies, to assure that the public interest can be served.

1989, ruled that such a franchise is required of Williams and is expected to issue his written order momentarily.

This action goes directly to the interests of the citizens of Oklahoma City. The Commission should defer its action in this case pending the result of that decision because of its effect on the people most interested in it—the people who must live with its results on a daily basis.

WHEREFORE, ONG respectfully requests the Commission, for the reasons set forth above, to grant rehearing and to deny the request of Williams for a certificate of public convenience and necessity.

Respectfully submitted,

OKLAHOMA NATURAL GAS COMPANY, A DIVISION OF ONEOK INC.

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Dated: March 1, 1989

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-561

WILLIAMS NATURAL GAS COMPANY and
LADD GAS MARKETING, INC.,
Plaintiffs/Applicants

and

SMITH COGENERATION, INC., and
POWERSMITH COGENERATION PROJECT,
LIMITED PARTNERSHIP,
Intervenors/Applicants.

v.

THE CITY OF OKLAHOMA CITY, and
OKLAHOMA NATURAL GAS COMPANY,
Defendants/Respondents.

BRIEF OF THE FEDERAL ENERGY
REGULATORY COMMISSION AS *AMICUS CURIAE*

[Filed June 22, 1989]

INTEREST OF THE FEDERAL ENERGY
REGULATORY COMMISSION

The Federal Energy Regulatory Commission ("Commission") hereby submits the following statement in support of plaintiffs' and intervenors' joint emergency applicaton for injunctive relief from a state court injunction.

The Commission objects to the state court injunction on the basis that it constitutes an impermissible intrusion into the Commission's exclusive jurisdiction over the transportation of natural gas in interstate commerce under section 1(b) of the Natural Gas Act ("NGA") and, unless overturned, will unlawfully render unenforceable the Commission's orders exercising that jurisdiction.

STATEMENT OF THE ISSUES

Whether the Oklahoma state court erred in (a) ruling that federal law does not preempt the state from requiring that an interstate transporter of natural gas obtain a franchise from local authority for such transportation, and (b) enjoining plaintiff Williams Natural Gas Company ("WNG") from the interstate transportation of gas to an end user until it obtains such a franchise.

STATEMENT OF THE CASE

Intervenors Smith Cogeneration, Inc. and PowerSmith Cogeneration Project (collectively "PowerSmith") entered into an agreement with plaintiff Ladd Gas Marketing, Inc. ("Ladd") to purchase natural gas for its cogeneration facility located on the grounds of the Firestone Tire and Rubber Company plant in Oklahoma City. To transport Ladd's gas to the cogeneration plant, the parties also entered into an agreement with plaintiff WNG to construct a 12.4 mile pipeline extension from its Cement pipeline to the cogeneration plant, and to transport Ladd's gas thereon. WNG's Cement pipeline is a high-pressure 16-inch pipeline, the principle function of which is to transport gas from fields in Oklahoma to WNG's interstate system for ultimate transmission to points inside and outside of Oklahoma.

WNG sought a certificate of public convenience and necessity to perform this construction and transportation from the Commission under section 7(c) of the NGA, 15 U.S.C. 717f(c). Defendant Oklahoma Natural Gas Company ("ONG"), a local distribution company which held

a franchise for gas sales in Oklahoma City and was also an unsuccessful bidder for PowerSmith's gas requirements, opposed the granting of a certificate before the Commission, arguing, *inter alia*, that WNG's extension of service to PowerSmith did not constitute transportation of natural gas in interstate commerce within the meaning of section 1(b) of the NGA. The Commission granted WNG's certificate, and in its Order stated that WNG's Cement pipeline had as its primary purpose the transportation of gas into and out of Oklahoma, and the proposed lateral would, by tying WNG's interstate system directly to an end user, be "an essential and integral element of the interstate transportation of natural gas." Appendix A at p. 7. ONG then sought rehearing of the Commission's order.

At the same time that it was participating in the Commission proceedings, ONG also sought and obtained various types of relief from the District Court of Oklahoma County, State of Oklahoma, the most significant of which was the ruling in issue here. After the Commission issued WNG's certificate, the state court issued a declaratory judgment that unless WNG obtained a franchise from the voters of Oklahoma City to transport gas and to construct its 12.4-mile extension pipeline, it could not lay its pipeline under Oklahoma City streets. To explain its belief that this ruling was not preempted by federal law, the state court stated:

> [T]he issue here is whether "transportation bypass" of ONG [i.e., bypassing ONG's local distribution services to sell gas directly to an end user] is a matter of exclusive federal jurisdiction or is of local concern subjecting such transaction to local regulatory authority.
>
> . . . .
>
> This Court concludes that "transportation bypass" . . . of ONG's exclusive right to the use of the public streets of Oklahoma City under its franchise con-

> stitutes competition with a franchised public utility, resulting in adverse economic effects on the local utility customers. . . . Such a matter is of legitimate local concern, and the means chosen by the State of Oklahoma is plausibly related to that concern. The Oklahoma Constitutional requirement of a franchise does not have as its central purpose the regulation of matters Congress intended to regulate.

Oklahoma Natural Gas Co. v. *Smith Cogeneration, Inc.*, No. 88-10553, slip op. at 4-5 (Dist. Ct. Okla. Cty., May 19, 1989).

Subsequent to the issuance of the state court judgment, the Commission denied ONG's request for rehearing of its earlier order granting the certificate, stating its view that the state court's determination was erroneous, since under section 1(b) of the NGA the Commission had exclusive jurisdiction over WNG's pipeline construction application. It also rejected ONG's claim that the granting of the certificate to WNG would cause ONG to lose both Firestone and PowerSmith as customers and, in consequence, raise its rates to its other customers, stating:

> ONG has lost an opportunity to serve a new customer—PowerSmith. While ONG and its customers will lose the benefits of serving this customer, ONG will be no worse off as it has never served PowerSmith. Further, ONG has not presented any evidence that the proposal will result in ONG's claimed loss of gas sales to Firestone. We find that ONG's allegation of losing gas sales to Firestone is merely speculative.

Appendix B at p. 7. The Commission also reiterated the position taken in its earlier order (*see* Appendix A) that the public interest was best served, not by shielding local distribution companies from competition, but by allowing market forces to prevail, absent any unfair competition. *Id.*

The injunctive relief here sought was triggered by the refusal, on an abstention principle, of the U.S. District Court for the District of Oklahoma to overturn the rulings of the state court.

ARGUMENT

I. THE STATE COURT'S RULING CONFLICTS WITH THE NGA'S EXCLUSIVE GRANT OF JURISDICTION TO THE COMMISSION OVER THE TRANSPORTATION OF NATURAL GAS IN INTERSTATE COMMERCE, AND THUS MUST BE OVERTURNED.

Section 1(b) of the NGA, 15 U.S.C. 717(b) "provides for exclusive Federal Energy Regulatory Commission (FERC) jurisdiction over 'the transportation of natural gas in interstate commerce, . . . the sale in interstate commerce of natural gas for resale . . . and . . . natural gas companies engaged in such transportation or sale.'" *Northwest Central Pipeline Corp.* v. *State Corporation Comm'n of Kansas*, —— U.S. ——, No. 86-1856, slip op. at 10 (March 6, 1989). As the Supreme Court has further made clear, in light of these provisions of the NGA, a state scheme of regulation fails when it is "directed at . . . the control of rates and facilities of natural gas companies [since those] are precisely the things over which FERC has comprehensive authority." *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 99 L.Ed. 2d 316, 330 (1988). The state's effort to control the activities of the interstate pipeline involved here is similarly beyond its power.

This plenary grant of jurisdiction by Congress over the "transportation of natural gas in interstate commerce" has preempted the kind of state regulation of this field that would occur, should this Court uphold the state court's ruling. As the Supreme Court recently stated:

> Congress has the power under the Supremacy Clause of Article VI of the Constitution to pre-empt state law. . . . In the absence of explicit statutory language signaling an intent to pre-empt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation . . . or where the state law at issue conflicts with federal law, either because it is impossible to comply with both . . . *or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives.*

Northwest Central Pipeline Corp. v. *State Corporation Comm'n of Kansas*, *supra* (slip op. at 10) (emphasis added, citations omitted); *see also Schneidewind*, *supra*, 99 L.Ed.2d at 325.[1]

Here, the Commission's Order "Granting Certificate" and Order "Denying Rehearing" (attached hereto as Appendices A and B) have plainly determined that WNG's construction of a pipeline extension to serve PowerSmith and its effectuation of that service would meet the public convenience and necessity, as required by section 7(c) of the NGA. Equally plain is the fact that the state court's action has prevented WNG from constructing the pipeline and commencing service.[2] The

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[1] For the Court's convenience we have appended hereto as Appendix C our recent brief filed in a case currently pending in the D.C. Circuit elaborating in detail the legal principles and relevant authorities on which we rest our claims of exclusive federal authority over, as here, "transportation bypass." *Michigan Consolidated Gas Co.* v. *Federal Energy Regulatory Commission*, No. 88-106 (D.C. Cir.).

[2] While it may be argued that the state court's ruling does not entirely prevent WNG from constructing its pipeline, but merely requires that WNG obtain a franchise from the voters of Oklahoma City, the fact that the Oklahoma City voters could choose not to grant the franchise constitutes the kind of potential for collision

state court has thus interfered with, and indeed nullified, the Commission's exercise of the authority and duty conferred on it by Congress, and such interference should not be permitted to stand.

II. THE COMMISSION, NOT THE STATE COURT, IS THE PROPER FORUM FOR RESOLUTION OF POLICY CONCERNS.

In its response to plaintiffs' and intervenors' joint emergency application for relief, ONG states that public policy considerations require that this Court not disturb the state court's injunction. ONG argues that as a local distribution company, it is required to serve all Oklahoma City customers, both high-revenue customers such as PowerSmith, and low-revenue customers such as residential users. If, the argument continues, WNG and Ladd can take away one of ONG's high-revenue customers, ONG will be forced to increase its rates to its other customers; thus, permitting the construction of WNG's pipeline will end by adversely affecting the public. These claims are flawed.

First, we emphasize that the Commission, not the state court, is the proper forum for resolution of this kind of policy question. And, as noted earlier, ONG did raise this issue in the Commission proceedings. The Commission considered it, and rejected it as constituting a less serious potential harm to the public than the alternative

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between state and federal regulation that, according to *Schneidewind*, requires federal preemption.

> When a state regulation "affect[s] the ability of [the Commission] to regulate comprehensively . . . the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act" or presents the "prospect of interference with the federal regulatory power," then the state law may be pre-empted even though "collision between the state and federal regulation may not be an inevitable consequence."

Schneidewind, supra, 99 L.Ed.2d at 331-332, citations omitted.

—*i.e.*, prohibiting free competition between ONG and other gas suppliers. ONG has appealed the Commission's orders here to the U.S. Court of Appeals for the D.C. Circuit (*Oklahoma Natural Gas Co.* v. *FERC*, No. 89-1376, filed on June 12, 1989). ONG should not, therefore, be permitted to evade this proper resolution of its concerns by an end run to an inappropriate state forum. *See Mississippi Power and Light* v. *Mississippi*, —— U.S. ——, 108 S.Ct. 2428 (1988).

Second, the state of Oklahoma is not without other remedies at its disposal to address the difficulties predicted by ONG. If, as ONG claims, its high-revenue customers in effect subsidize its low-revenue customers, the state could formalize this subsidy process by other means. As the D.C. Circuit said when faced with a similar policy concern:

> For example . . . a state is free to tax gas sales to industrial customers and apply the proceeds to whatever subsidies it likes. This may be more awkward than the present arrangement, in which a state commission may attune its rate rulings to the price elasticity of each purchasing firm. But to say that is only to say that the present arrangement allows states to employ extraordinarily ad hoc means to finance subsidy programs. . . . [I]t is hard to see anything in the NGA that guarantees states the right to use such means. . . .
>
> . . . .
>
> [The Commission also] argues that the [state] commissions may protect the captive consumers by modifying rate designs so that [local distribution company] shareholders, rather than ratepayers, bear the consequences of [the company's] inability to handle competition.

Associated Gas Distributors v. *FERC*, 824 F.2d 981, 1036 (D.C. Cir. 1987), *cert. den.*, —— U.S. ——, 108 S.Ct. 1468 (1988).

ONG should not be permitted to obscure the central issue here—the state court's usurpation of federal jurisdiction—with this policy-based argument. Such an argument is properly made in the U.S. Court of Appeals on a challenge to the Commission's orders as arbitrary, capricious, or otherwise constituting an abuse of discretion. As noted above, ONG has appealed the Commission's orders to the D.C. Circuit, and that court will, therefore, have occasion to adjudicate this policy question. The instant proceeding initiated in state court, however, instead invokes state jurisdictional authority which, as we have shown, has no basis in the law.

CONCLUSION

For the reasons stated, the Commission supports plaintiffs and intervenors in seeking emergency injunctive relief from the erroneous determination of the Oklahoma state court, which conflicts with the Commission's lawful exercise of its established authority.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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JOSEPH F. SAPNIOL, JR.
CLERK

No. 89-1296

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

OKLAHOMA NATURAL GAS COMPANY,
Petitioner,

v.

WILLIAMS NATURAL GAS COMPANY,
SMITH COGENERATION, INC.,
POWERSMITH COGENERATION PROJECT,
LIMITED PARTNERSHIP, and
CITY OF OKLAHOMA CITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT SUPPLEMENTAL BRIEF IN OPPOSITION FOR WILLIAMS NATURAL GAS COMPANY, SMITH COGENERATION, INC., AND POWERSMITH COGENERATION PROJECT, LIMITED PARTNERSHIP

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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JOINT SUPPLEMENTAL BRIEF IN OPPOSITION FOR WILLIAMS NATURAL GAS COMPANY, SMITH COGENERATION, INC., AND POWERSMITH COGENERATION PROJECT, LIMITED PARTNERSHIP

In our Joint Brief in Opposition to the Petition for a Writ of Certiorari, we pointed out (Br. in Opp. 8) that ONG had filed a petition for review of FERC's certificate orders with the United States Court of Appeals for the District of Columbia Circuit. We also pointed out (*id.* at 8 n.4) that ONG had moved the D.C. Circuit to defer decision on that appeal until this Court acts on

ONG's petition, and to accept supplemental briefs on preemption if the petition is denied. The D.C. Circuit denied ONG's motion in an order issued on March 16, 1990 (Resp. Supp. App. 1a-2a). The D.C. Circuit stated: "[h]ad petitioner filed this motion in a timely manner following the Tenth Circuit's decision on November 22, 1989, the court might have considered enlarging the issues on review to include *the preemption question, which appears to have been addressed by the Commission*" (*id.* at 2a (emphasis added and citations omitted)). This characterization of the FERC orders, rendered by the court of appeals acting on direct review, supports our view of those orders (Br. in Opp. 11-15) and undercuts ONG's (Pet. 14-17, 19-20; Reply Br. 3-4).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 20, 1990

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1989

Calendared For: 3/20/90

No. 89-1376

OKLAHOMA NATURAL GAS COMPANY,
A DIVISION OF ONEOK, INC.,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

WILLIAMS NATURAL GAS COMPANY, *et al.*,
Intervenors

Before: Ruth B. Ginsburg, Silberman and Thomas, Circuit Judges

ORDER

[Issued March 16, 1990]

Upon consideration of petitioner's conditional motion for leave to file supplemental briefs and to hold the court's decision on the merits of the appeal in abeyance, the response thereto, and the reply, it is

ORDERED that the motion be denied. The extent to which the National [*sic*] Gas Act serves to preempt state

regulation is not the subject of this petition for review; the court, therefore, does not require further briefing on this issue. *See, e.g., Michigan Consolidated Gas Co. v. FERC*, 883 F.2d 117, 122 (D.C. Cir. 1989).

Had the petitioner filed this motion in a timely manner following the Tenth Circuit's decision on November 22, 1989, the court might have considered enlarging the issues on review to include the preemption question, which appears to have been addressed by the Commission. *Compare Williams Natural Gas Co.*, 47 F.E.R.C. ¶ 61,308, at 62,102 n.5 (1989) (asserting that FERC's jurisdiction is exclusive) *with City of Pittsburgh v. FPC*, 237 F.2d 741, 749 (D.C. Cir. 1956) (appeals court has jurisdiction over issue resolved by Commission although not raised by petitioner). Petitioner, however, waited for three months and until three weeks before oral argument to bring this motion. We see no cause to permit alteration of the briefing schedule or of the contours of our review based on petitioner's tardy request. *See* Fed. R. App. P. 28(c).

Per Curiam

Supreme Court, U.S.
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No. 89-1296

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

OKLAHOMA NATURAL GAS COMPANY,
Petitioner,
v.
WILLIAMS NATURAL GAS COMPANY,
SMITH COGENERATION INC.,
POWERSMITH GOGENERATION PROJECT
LIMITED PARTNERSHIP, and
CITY OF OKLAHOMA CITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR PETITIONER

The petition in this case asks this Court to decide two isues: (1) whether a state-law issue not bearing on the validity of a FERC certificate must be presented to FERC under Section 19(b) of the NGA and may not be adjudicated by a state court; and (2) whether, once a state court has determined that it has jurisdiction over the state-law issue, a lower federal court may enjoin enforcement of the state court judgment if it believes that the state court was mistaken. As we have said, we think that the Tenth Circuit, in giving affirmative answers to those questions, not only misconstrued Section 19(b) but improperly short-circuited the course of state appellate review. Respondents' arguments to the contrary do not

make the decision below any more correct or less significant.

1. Respondents insist that the Tenth Circuit's Section 19(b) ruling was fact-bound and nothing more than a "routine application" of *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958). Br. in Opp. 10. Both halves of the contention are incorrect. To begin with, the Tenth Circuit's ruling is anything but fact-bound: it commits to exclusive FERC jurisdiction—and bars from the jurisdiction of state courts—every possible claim, like ONG's, that the holder of a valid FERC certificate must comply with a particular state law. Such claims arise frequently, *see* Pet. 18-19 (citing cases), and have routinely been considered by state and federal courts outside the context of Section 19(b). *Ibid.*

The ruling below is also far from a routine application of *Tacoma*. Indeed, respondents can make that assertion—and can make their colorful complaints of end runs, piecemeal litigation, collateral attacks, and preemptive strikes—only by *assuming* that a state-law claim like ONG's is one that must be presented to FERC pursuant to Section 19(b).[1] Yet, put to proving that assumption, respondents are unable to cite a single case

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[1] Contrary to respondents' claim (Br. in Opp. 11), Section 7(e) of the NGA does not require presentation to FERC of a claim that, even if a certificate applicant obtains a valid certificate, it must also comply with a particular state law. *Cf.* the provision at issue in *Tacoma*, Section 9 of the Federal Power Act, 16 U.S.C. § 802, which expressly places issues of compliance with state law before FERC as a prerequisite to issuance of a license. Respondents cite no case supporting their view. The general language of Section 7(e) no more applies in the present case than it did in the various decisions outside the Section 19(b) context (Pet. 18-19) addressing claims, like ONG's, that a holder of a valid FERC certificate must comply with a particular state law. *See Manufacturers Light & Heat Co.*, 44 FPC 1219, 1234, *aff'd*, 44 FPC 1223 (1970) (finding Section 7(e) satisfied, stating that "[a]pplicants can be relied on to obtain whatever authorization, if any, which may be required under the laws of the states involved") (internal quotes omitted).

holding that a claim like ONG's is subject to exclusive FERC jurisdiction under Section 19(b). Any such holding, in fact, would be contradicted by the language of Section 19(b)—which respondents pointedly never quote—because a claim such as ONG's does not seek "to affirm, modify, or set aside" a FERC certificate, but rather takes the validity of the FERC certificate for granted.[2] As we have previously pointed out (Pet. 15-16), there is a basic difference between claims that a certificate is invalid and claims that it must coexist with additional requirements of state law.

This difference escaped the Tenth Circuit, and it quite clearly escapes respondents as well. Although respondents claim that ONG "raised preemption" before FERC by challenging FERC's jurisdiction under Section 1 of the NGA (Br. in Opp. 11-13), ONG obviously did no such thing. In the first place, it is *respondents* that seek to have state law preempted; yet, while they raised preemption in state court (as a defense), they never presented that issue to FERC. The reason that they did not do so is that ONG did not raise its state-law claim in the FERC proceeding. The question whether FERC has jurisdiction under Section 1 of the NGA to issue a certificate, which

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[2] Such a holding would also run afoul of this Court's decision in *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 656 (1961), which, contrary to respondents' assertion (Br. in Opp. 15 n.8), held that Section 19(b) did not oust state courts of jurisdiction to decide a state-law claim even though the defendant raised a preemption defense.

Respondents take wholly out of context (Br. in Opp. 15 n.8) the statement in *Pan American* that the Court "was not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private contract rights . . . in controversy" (366 U.S. at 664). That was so simply because the Court did not have before it the merits of the preemption defense and the state courts' jurisdiction depended only on the substance of the plaintiff's complaint, not on the substance of the defense. "The fact that Cities Service sues in contract or quasi-contract, not the ultimate validity of its argument, is decisive." *Ibid.*

ONG did raise before FERC, is different from the question whether, in any event, a FERC-certificated project must also comply with a particular state law,[3] which ONG raised in state court.

Respondents' efforts to align FERC with their position are unavailing. Br. in Opp. 14-15. In the Tenth Circuit, FERC did *not* argue that the issues of state law and federal preemption must be decided by a reviewing court under Section 19(b), as the Tenth Circuit eventually concluded. Rather, it actively urged the Tenth Circuit itself to decide whether the state franchise law was preempted. Resp. App. 43a-45a.[4] In short, FERC, the statute, and uniform case law all differ with the Tenth Circuit's view that Section 19(b) provides the exclusive avenue for asserting a claim that a holder of a valid FERC certificate must also comply with state law.

2. With respect to the injunction against the state-court judgment, respondents do not deny that the Tenth

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[3] Thus, respondents themselves acknowledge that, even with a valid FERC certificate, Williams was subject to state environmental laws. Br. in Opp. 3. As respondents also note (Br. in Opp. 12 n.5), FERC itself stated that its view on the preemption of the state franchise law played no role in its certificate decision and specifically noted that the preemption question had not yet arisen, distinguishing it from the question of jurisdiction. Pet. App. 72a.

ONG suggested that FERC briefly defer its ruling on the certificate application pending an imminent decision by the state court. *See* Br. in Opp. 6. Without asserting that the expected state court decision was actually relevant to issues in the FERC proceeding, ONG stated simply that the state "action goes directly to the interests of the citizens of Oklahoma City." Resp. App. 38a.

[4] The statements in FERC's brief quoted by respondents (Br. in Opp. 15) are not at all to the contrary. The first merely asserts FERC's interest in the case and its view on the merits of the preemption question, stating that the state-court ruling would "unlawfully render unenforceable the Commission's orders." The second is by its terms addressed purely to ONG's policy concerns, which ONG did raise before FERC, not to ONG's claim under state law.

Circuit substituted its own order for the normal process of state appellate review. Respondents simply say that this extraordinary departure was justified because state courts should not have been exercising jurisdiction in the first place. Respondents' arguments are meritless.

Respondents first assert that the injunction was necessary because the state court order "interfered with the federal court's priority of *in rem* jurisdiction" under Section 7(h) of the NGA. Br. in Opp. 17. This basis for the injunction, of course, is wholly respondents' invention: it was not relied on (or even mentioned) by the court of appeals. Moreover, there are good reasons for the Tenth Circuit to have avoided reliance on the point. First, the cause of action under Section 7(h) properly covered only the condemnation of property rights, and had nothing to do with the adjudication of ONG's rights and Williams' obligations under the state franchise law. The latter questions were injected into this case by Williams only under a separate state-law pendent cause of action. *See* Pet. App. 97a-99a.[5] Second, and in any event, the Tenth Circuit did not seek to protect *its own* jurisdiction to decide the issues addressed by the state court but the jurisdiction of another court of appeals (the D.C. Circuit). Respondents do not explain how the state court's decision of those issues could have interfered with the *in rem* jurisdiction of a court that itself was barred from addressing those issues.

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[5] Section 7(h) provides for condemnation of easements that may be used to "construct, operate, and maintain" a pipeline, but it is addressed only to the securing of property interests. A holder of such an interest must comply with other applicable laws, such as environmental laws, that might restrict activities using those property interests. Similarly, *in rem* jurisdiction is exclusive only to the extent "necessary for the appropriate control and disposition of the property," and other courts do not lose their "power to make orders which do not conflict with the authority of the court having [*in rem*] jurisdiction." *Penn General Cas. Co. v. Pennsylvania*, 294 U.S. 189, 198 (1935).

Respondents' two other principal arguments in support of the injunction are no stronger. First, respondents suggest that the federal court collateral attack on the state court decision was permissible because Oklahoma law would not give preclusive effect to the state court decision. Br. in Opp. 18. Not surprisingly, however, respondents cite no Oklahoma decision that would allow a party to attack a state court decision collaterally on grounds of lack of jurisdiction rather than simply appeal the decision. An appeal was the proper way to proceed here as well. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970).

Second, respondents suggest that the lower federal court injunction was proper because the NGA "creates an exclusive jurisdictional scheme." Br. in Opp. 18. But the Oklahoma courts expressly concluded that they had jurisdiction over petitioner's claim, notwithstanding respondents' arguments about exclusive federal jurisdiction. While the Tenth Circuit plainly took a different view, that disagreement provides no grounds for bypassing the ordinary process of direct appeal by which any erroneous assertion of jurisdiction is typically to be corrected. Respondents are thus unable to cite any decision of this Court that supports such interference with state judicial processes. *See* Br. in Opp. 19 n.12 (citing cases).[6]

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[6] We note, in particular, that *Kalb v. Feuerstein*, 308 U.S. 433, 438-44 (1940), whose current meaning is in considerable doubt (Pet. 26-27), not only arose in the possibly unique context of bankruptcy, but did not in fact involve a collateral attack on a previously decided question. And *Brown v. Felsen*, 442 U.S. 127, 134-39 (1979), merely declined to apply *claim* preclusion where its application would encroach on the federal (bankruptcy) scheme; the Court expressly noted that *issue* preclusion principles were different and that collateral relitigation of at least a factual issue actually decided by the state court would not be permitted. 442 U.S. at 139 n.10. In the present case, the state court actually decided that it had jurisdiction.

In short, even if the state court lacked jurisdiction, review of its contrary holding should have been sought only through direct appeal, and the Tenth Circuit erred in ordering the district court to enjoin enforcement of the state court order for lack of jurisdiction. That intrusion on state judicial authority should not be allowed to stand without this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 89-1296 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1989

OKLAHOMA NATURAL GAS COMPANY, PETITIONER

v.

WILLIAMS NATURAL GAS COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

The Federal Energy Regulatory Commission issued a certificate of public convenience and necessity to an interstate natural gas pipeline to construct and operate a pipeline in Oklahoma City, Oklahoma. Petitioner, a competing intrastate pipeline holding a state law franchise to service customers in Oklahoma City, unsuccessfully opposed the Commission's issuance of the certificate, and petitioned the D.C. Circuit for review of that decision. At the same time, petitioner obtained an Oklahoma state court injunction barring the interstate pipeline from exercising its rights under the certificate without first obtaining a franchise under Oklahoma law. The interstate pipeline filed this action in the United States District Court for the Western District of Oklahoma to enforce its rights under the Commission's certificate, and on appeal, the Tenth Circuit held that enforcement of the state court injunction should be enjoined.

The questions presented are:

1. Whether Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), which vests exclusive authority in the United States Court of Appeals "to affirm, modify, or set aside" orders of the Federal Energy Regulatory Commission on petitions for review by aggrieved parties, deprived the state court of jurisdiction to determine whether the interstate pipeline must comply with the state franchise law before exercising its rights under the Commission's certificate.

2. Whether the court of appeals correctly held that the district court should enjoin enforcement of the state court judgment barring the interstate pipeline from exercising its rights under the Commission's certificate.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1296

OKLAHOMA NATURAL GAS COMPANY, PETITIONER

v.

WILLIAMS NATURAL GAS COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

This submission responds to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. Section 1(b) of the Natural Gas Act (NGA), 15 U.S.C. 717(b), provides that the NGA, as administered by the Federal Energy Regulatory Commission, "shall apply to the transportation of natural gas in interstate commerce * * * but shall not apply to any other transportation * * * of natural gas or to the local distribution of natural gas." Under Section 7(c) of the NGA, 15 U.S.C. 717f(c), a natural gas company may not "engage in the transportation * * * of natural gas, subject to the jurisdiction of the Commission" nor "undertake the construction or extension of any facilities therefor

* * * unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations."

When a natural gas company applies for a certificate, other interested entities may intervene as parties to the proceeding before the Commission. See Section 7(c)(1)(B), 15 U.S.C. 717f(c)(1)(B); 18 C.F.R. 157.10, 385.214. If the Commission issues the certificate, the natural gas company "may acquire [rights-of-way and property needed to operate the certificated service] by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts." Section 7(h), 15 U.S.C. 717f(h). The certificate prohibits the natural gas company from "abandon[ing,]" *i.e.*, discontinuing, any certificated service or facilities without the Commission's authorization. See Section 7(b), 15 U.S.C. 717f(b).

Any party "aggrieved by an order issued by the Commission [under the NGA]" may obtain judicial review in a United States Court of Appeals by filing a "written petition praying that the order of the Commission be modified or set aside in whole or in part." Section 19(b), 15 U.S.C. 717r(b). Section 19(b) further provides that "[u]pon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part." *Ibid.*

2. In 1988, respondent PowerSmith Cogeneration Project, Limited Partnership, was building a cogeneration facility on the grounds of the Firestone Tire and Rubber plant in Oklahoma City, Oklahoma. PowerSmith needed a natural gas company to transport natural gas to its new facility. Petitioner, the local distribution company with a city franchise to sell, transport, and distribute gas

to the public in Oklahoma City,[1] and respondent Williams Natural Gas Company, an interstate "natural-gas company" subject to the jurisdiction of the Commission, competed for the PowerSmith contract. PowerSmith awarded the contract to Williams. In order to service PowerSmith, Williams needed to construct a twelve-mile pipeline from its nearby interstate facilities to PowerSmith's cogeneration plant. Pet. App. 2a-3a.

Petitioner, recognizing that Williams needed to obtain the Commission's approval before building the pipeline, filed a declaratory judgment action on October 18, 1988, against Williams in Oklahoma County District Court. In that state court action, petitioner sought an order declaring that Williams, by virtue of petitioner's franchise, "cannot * * * use any of Oklahoma City's streets * * * or other public rights of way for the purpose of laying pipelines * * * for the transmission of natural gas to [PowerSmith] without first obtaining a franchise from Oklahoma City." Pet. App. 85a.[2]

Ten days later, on October 28, 1988, Williams applied to the Commission for a certificate of public convenience and necessity, under Section 7(c) of the NGA, to build

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[1] Petitioner obtained the state law franchise in April 1985. Pet. App. 82a-83a. Under Oklahoma law, a municipality may award a franchise—which may not be granted, extended, or renewed for a longer term than 25 years—only after approval by "a majority of the qualified electors residing within its corporate limits." Okla. Const. art. 18, § 5(a). Franchises are not exclusive. Okla. Const. art. 18, § 7. Under state law, however, if a firm is serving a local community under a franchise, a competing firm in certain circumstances must obtain another franchise before entering the market. See *Oklahoma Gas & Elec. Co.* v. *Total Energy, Inc.*, 499 P.2d 917, 924 (Okla. 1972).

[2] Williams countered by contending that the relevance—if any—of the state law franchise requirement should be resolved in the federal certificate proceeding before the Commission, and that, in any event, state law did not require that it obtain a franchise under the circumstances. See Pet. App. 87a-92a.

and operate the PowerSmith pipeline. Petitioner opposed Williams' application and intervened in the Commission proceeding. Petitioner contended, among other claims,[3] that "the facilities proposed by [Williams] are subject to local rather than federal regulation [because] 'the proposal * * * in fact relates to service in the nature of distribution or intrastate transportation,'" Pet. App. 52a-53a, not to service in interstate commerce.

3. a. On February 16, 1989, the Commission granted Williams' application and issued a certificate to build and operate the PowerSmith pipeline. Pet. App. 45a-61a. The Commission specifically found, contrary to petitioner's principal contention, that

> the facilities proposed by [Williams] will involve an expansion of [Williams'] interstate pipeline system which is used to transport gas in interstate commerce. Accordingly, the facilities [Williams] proposes to construct in its application are subject to the Commission's jurisdiction and to the requirements of subsections (c) and (e) of section 7 of the NGA.

Id. at 55a. The certificate, among other things, authorized Williams to use Oklahoma City's streets, alleys, and other public rights of way in order to lay pipelines and install other equipment necessary for the transmission of natural gas.[4] The certificate further provided that the

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[3] In addition to asserting that Williams' proposed pipeline should not be subject to the Commission's jurisdiction, petitioner contended that it would provide a more advantageous service to consumers if allowed to service PowerSmith, and that Williams' certificate application was incomplete. See Joint Br. in Opp. App. 14a-17a.

[4] The certificate obligated Williams to continue operation of and service on the pipeline unless it received the Commission's prior approval, see 15 U.S.C. 717f(b), and vested Williams with the ability to exercise its delegated right of eminent domain, see 15 U.S.C. 717f(h). See p. 2, *supra*.

new facilities "shall be completed and placed in actual operation" by mid-August 1989. *Id.* at 61a.[5]

b. That same day, the Oklahoma County District Court issued an order holding that state law required Williams to obtain a franchise as a prerequisite to transporting gas to PowerSmith within Oklahoma City limits. Pet. App. 22a-25a. The state court, however, reserved ruling "on the issue whether federal law preempts the requirements of Williams obtaining a franchise from the City of Oklahoma City." *Id.* at 24a.

4. a. On March 28, 1989, Williams filed a condemnation action, under Section 7(h) of the NGA, against petitioner and respondent City of Oklahoma City in the United States District Court for the Western District of Oklahoma. Pet. App. 93a-99a. Pursuant to its FERC certificate, Williams sought to acquire, use, and immediately possess rights-of-way across the City's streets. *Id.* at 95a-97a. In addition, Williams sought to quiet title to the condemned property with respect to petitioner's assertion of competing state-law franchise rights. *Id.* at 97a-99a. Three weeks later, on April 18, 1989, the district court

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[5] On March 1, petitioner filed with the Commission a request for rehearing under Section 19 of the NGA, 15 U.S.C. 717r. Joint Br. in Opp. App. 19a-38a. Petitioner contended that

> [s]ince the proposed direct natural gas service by Williams to PowerSmith involves the "local distribution of natural gas," such distribution is beyond the regulatory jurisdiction of the Commission since Congress, under Section 1(b) of the NGA, reserved the same to the States.

Id. at 34a. And petitioner emphasized that "[t]he bypass of the existing utility [*i.e.*, petitioner], as proposed in this case, presents a situation of essentially local concern and vital interest to the State of Oklahoma." *Ibid.*

Petitioner also asked the Commission to defer a final decision on Williams' certificate application pending the resolution of petitioner's state court action since that "action goes directly to the interests of the citizens of Oklahoma City." Joint Br. in Opp. App. 38a.

granted Williams "immediate possession of the easements sought to be condemned." *Id.* at 34a.[6]

b. On May 19, 1989, the Oklahoma County District Court resolved the outstanding preemption issue, holding that "federal law does not pre-empt Oklahoma law under the facts presented in this case." Pet. App. 29a.[7] Accordingly, the state court permanently enjoined Williams from using "any of Oklahoma City's streets, alleys or other public rights-of-way for the purpose of laying pipeline and other equipment for the transport of natural gas and/or transport of natural gas in its existing pipelines that are currently using the public streets of Oklahoma City [to PowerSmith] without first obtaining a franchise from the voters of Oklahoma City." *Id.* at 30a.[8]

c. Williams promptly returned to federal court to obtain that court's authorization to operate "the pipeline on the condemned property and, if necessary, [an injunction of] the state court proceeding and enforcement of any orders issued therein to permit such operation." Pet. App. 40a-41a. On May 30, the federal district court denied relief, concluding that "it is barred from addressing the

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[6] According to the district court, petitioner and Williams had agreed that "entry of such order would permit the construction, but not the use, of the proposed pipeline." Pet. App. 31a. The latter would await the district court's disposition of Williams' remaining quiet-title claim. *Id.* at 31a-32a.

[7] In the meantime, the state court on April 28 had temporarily restrained Williams from constructing its pipeline. On May 1, the federal district court stayed that order as "an interference with [its] jurisdiction," thereby permitting Williams to continue to build the pipeline. Pet. App. 37a.

The federal court, noting that "[t]he issue of pre-emption having first been presented to the State court," stated that it would "not proceed to decide that issue in advance of the state court decision on the issue if that be made within a reasonable time." Pet. App. 37a.

[8] On July 18, 1989, Williams appealed the state court ruling to the Oklahoma Supreme Court. *Smith Cogeneration, Inc.* v. *Oklahoma Natural Gas Co.*, No. 73,649. That appeal remains pending.

question of pipeline operation by the *Rooker* doctrine." *Id.* at 41a (citing *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923) (federal court may not act as an appellate court for purpose of reviewing a state court judgment)).

d. On May 31, the Commission denied petitioner's request for rehearing of the certificate proceeding. Pet. App. 62a-74a. The Commission again rejected petitioner's request to defer its ruling pending disposition of the state court proceeding. As the Commission explained:

> [A] determination by the state court as to whether or not [Williams] requires authorization under the franchise law to install the pipeline in Oklahoma City has no bearing on our determination of whether the [proposed pipeline] is in the public convenience and necessity. Should the state court determine that [Williams] needs authorization under the franchise law, the issue will be whether or not that determination is preempted by our certificate authorization.

Id. at 72a.[9]

Under Section 19(b) of the NGA, petitioner filed in the D.C. Circuit a petition for review of the Commission's order issuing a certificate to Williams. *Oklahoma Natural Gas Co.* v. *FERC*, No. 89-1376 (argued Mar. 20, 1990).[10] That petition is currently pending.

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[9] The Commission noted the Oklahoma District Court's recent ruling that Williams was subject to the state franchise law and stated that "[i]t is our view that the state court's determination is erroneous." Pet. App. 65a n.5. The Commission explained that since "[t]he direct transportation service to be provided by [Williams] to PowerSmith * * * involves interstate transportation and at no point becomes local distribution," the Commission "has exclusive jurisdiction over the proposal." *Ibid.*

[10] On February 23, 1990, petitioner filed with that court a conditional motion for leave to file a supplemental brief on preemption issues if this Court denied certiorari. See Joint Supp. Br. in Opp. App. 1a-2a. The court of appeals denied that motion on March 16, explaining that "[h]ad the petitioner filed this motion in a timely manner following the Tenth Circuit's decision on November 22, 1989, the court might have considered enlarging the issues on review to

5. On Williams' appeal from the district court's refusal to enjoin enforcement of the state court order, the court of appeals reversed, holding that "the proceedings in the state court that resulted in the order enjoining Williams' exercise of rights granted in the FERC certificate constituted an impermissible collateral attack on a FERC order in contravention of § 19 of the NGA." Pet. App. 18a. Accordingly, the court concluded that the district court "erred in refusing to enjoin the enforcement of the state court injunction," *ibid.*, and therefore remanded the case for further proceedings, *id.* at 21a.[11]

a. The court of appeals noted that Section 19 of the NGA is the "statutorily provided means for contesting a FERC certificate," Pet. App. 9a, and that those "special judicial review provisions * * * are exclusive," *id.* at 10a. Relying on *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), the court concluded that "a challenger may not collaterally attack the validity of a prior FERC order in a subsequent proceeding." Pet. App. 13a. Here, the court of appeals found that the state proceeding constituted such an attack because "the state court's consideration of the preemption issue [raised by petitioner in the declaratory judgment action] ultimately challenges FERC's determination of its own jurisdiction." Pet. App. 14a. Under Section 19 of the NGA, however, petitioner "could have and should have raised the preemption issue before FERC originally or upon its motion for rehearing." *Id.* at 17a.[12]

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include the preemption question, which appears to have been addressed by the Commission." *Id.* at 2a.

[11] The court of appeals later stayed issuance of the mandate pending disposition of the petition for a writ of certiorari. Pet. App. 79a-80a.

[12] The court declined to resolve the substantive issue whether the Natural Gas Act preempted application of the state franchise law to Williams' proposed pipeline. Pet. App. 8a-9a, 17a. That issue, if properly raised, would be resolved by the D.C. Circuit on the pend-

b. The court of appeals also determined that its conclusion was not at odds with the *Rooker* doctrine. Pet. App. 18a. In its view, "the state action crosse[d] the *Rooker* boundary," *id.* at 20a, "where, as here, a state court has erroneously taken appellate jurisdiction over issues that have been previously decided by a federal agency, or when review of those issues could have and should have been sought pursuant to the federal statutory scheme," *id.* at 21a.

DISCUSSION

Petitioner has sought to challenge its competitor's authority to build and operate a FERC-approved pipeline before three different judicial forums—the Oklahoma state courts, the Oklahoma federal courts, and the D.C. Circuit. And each case is currently winding its way through the respective appellate process. At bottom, however, each of petitioner's challenges has the same objective—to prevent Williams from operating its pipeline in accord with the FERC certificate. Such a challenge to the certificate necessarily entails the sort of relief available exclusively from the federal court of appeals reviewing the validity of the certificate under Section 19(b) of the NGA. In our view, the court of appeals properly construed Section 19(b), in light of *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958), as foreclosing petitioner's attempt to mount a collateral challenge in state court to the effectiveness of the FERC certificate.

The court of appeals therefore correctly concluded that the state court lacked jurisdiction to issue its injunctive decree. Even so, the court of appeals' ruling directing the district court to enjoin enforcement of the state court judgment raises questions under the Anti-Injunction Act, 28 U.S.C. 2283, and related doctrines. But in the un-

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ing petition for review of the FERC certificate. *Id.* at 17a; see p. 7, *supra*.

usual context of this case, we believe that the court of appeals' ruling is consistent with governing legal principles authorizing federal courts to issue injunctions in aid of their jurisdiction, and that there is no statutory or prudential bar to issuance of such an injunction. Accordingly, further review is not warranted.

1. a. The certificate issued by the Commission to Williams under Section 7(c) of the NGA required the firm to construct a pipeline within the corporate limits of Oklahoma City; to begin transporting gas through that pipeline by August 16, 1989; and to continue operations unless and until it received the Commission's approval to abandon service. Pet. App. 61a; see 15 U.S.C. 717f(b). And petitioner concedes (Pet. 14) that under Section 19(b) of the NGA, the courts of appeals have exclusive jurisdiction "to affirm, modify, or set aside" such Commission orders. See, *e.g.*, *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 497 (1955). But contrary to petitioner's assertions (Pet. 14-16), its state law claim had no purpose other than to obtain such relief.

On the record presented, petitioner's state declaratory judgment action sought to subject Williams' use of the FERC-approved pipeline to the state law franchise requirement and thus necessarily to prevent Williams from operating the pipeline under the express terms of the FERC certificate. Indeed, petitioner's state law action sought to enjoin implementation of the FERC certificate by subjecting Williams' proposed pipeline to an additional state law requirement. Accordingly, the distinction petitioner draws (Pet. 16) between "the *validity* or *lawfulness* of the FERC certificate," which it concedes for purposes of this case, and "the *legal* effect" of that certificate, is illusory. Petitioner's state law action sought the functional equivalent of the relief available exclusively from federal court review of FERC orders under the "clear and straightforward" (Pet. 14) provisions of Section 19(b). Thus, the court of appeals correctly concluded that petitioner's state law action constituted an

impermissible end run around the exclusive review provisions of Section 19(b) of the NGA.

b. This Court's decision in *City of Tacoma* v. *Taxpayers of Tacoma, supra*, confirms the validity of the court of appeals' determination. There, the Federal Power Commission, over the State of Washington's objection, issued a power plant license to the City of Tacoma. On the State's petition for review under the exclusive review provisions of Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b)—the predecessor to Section 19(b) of the NGA—the court of appeals upheld the license. Thereafter, the Washington state courts held that state law precluded the City from condemning property to build the plant—an issue that had been raised in the FPC review proceeding—and accordingly enjoined the City and its licensee from proceeding under the FPC license. 357 U.S. at 325-333, 338-339. This Court reversed that judgment, concluding that since Section 313(b) of the Federal Power Act "prescribed the specific, complete, and exclusive mode of review of the Commission's order," the provision "necessarily precluded *de novo* litigation between the parties of all issues inhering in the controversy, and all other means of judicial review." 357 U.S. at 375-376. See also *FCC* v. *ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984); *Whitney Nat'l Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 419-426 (1965).

Despite petitioner's claims to the contrary (Pet. 20-21), the rationale of *City of Tacoma* applies to the circumstances of this case. First, the Court's holding does not rest narrowly on principles of "*issue* preclusion," as opposed to "*claim* preclusion." Pet. 21. Though it could have chosen to resolve the case on that ground alone, the Court eschewed such an approach, stating that the requirement of "statutory finality" established by the FPC's exclusive review provisions "need not be labeled *res judicata*, estoppel, collateral estoppel, waiver or the like either by Congress or the courts." *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. at 336-337. Indeed, the Court

emphasized that its holding went not simply to the question of preclusion but to the *jurisdiction* of the state court:

> [E]ven if it might be thought that [the state law] issue was not raised in the Court of Appeals, it cannot be doubted that it could and should have been, for that was the court to which Congress had given "exclusive jurisdiction to affirm, modify, or set aside" the Commission's order. And the State may not reserve the point, for another round of piecemeal litigation, by remaining silent on the issue while its action to review and reverse the Commission's order was pending in that court—which had "exclusive jurisdiction" of the proceeding and whose judgment therein as declared by Congress "shall be final" * * *.

Id. at 339.

Thus, petitioner may not avoid the rationale of *City of Tacoma* by the pleading maneuver of not explicitly raising the state franchise law issue in the certificate proceeding before the Commission and in the petition for review under Section 19(b) in the D.C. Circuit. The sole purpose of asserting that issue is to block Williams' exercise of its rights to operate the pipeline under the FERC certificate. Thus, the issue is one that necessarily "inher[es] in the controversy" surrounding the validity of the certificate, and that "could and should have been [raised and litigated]" before the Commission and the court of appeals on the petition for review under Section 19(b). *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. at 336, 339.

Second, petitioner errs in asserting that this Court's conclusion in *City of Tacoma* is distinguishable because Section 9 of the Federal Power Act, 16 U.S.C. 802, which has no precise equivalent under the NGA, "requires the license applicant to give satisfactory evidence of compliance with applicable state law." Pet. 21. Section 9 cannot bear the weight petitioner would have it carry. As this Court has made plain:

> [Section 9] does not itself require compliance with any state laws. Its reference to state laws is by way of suggestion to the Federal Power Commission of subjects as to which the Commission may wish some proof submitted to it of the applicant's progress.

First Iowa Hydro-Elec. Cooperative v. *FPC*, 328 U.S. 152, 177-178 (1946); see *California* v. *FERC*, No. 89-333 (May 21, 1990), slip op. 8-9. Moreover, Section 9 did not account for the Court's holding in *City of Tacoma*. To the contrary, the Court rested its decision on the language of the exclusive judicial review provisions of Section 313(b) of the Federal Power Act, whose terms are, in all relevant aspects, identical to those in Section 19(b) of the NGA. See *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981).[13]

c. Petitioner relies (Pet. 16-18) on several decisions in which federal regulatory statutes, including the NGA, were held, under the particular circumstances, not to preclude the exercise of state jurisdiction. But those decisions do not conflict with the decision below. Neither this

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[13] Contrary to petitioner's assertion, the decision below is not inconsistent with this Court's decisions resolving preemption questions raised outside the context of Section 19(b) review proceedings. See Pet. 18 (citing cases). None of those decisions involved the circumstances at issue here, namely, a collateral state law challenge effectively seeking to thwart the exercise of rights granted by a presumptively valid FERC certificate.

In *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295 (6th Cir. 1989), cert. denied, 110 S. Ct. 1806 (1990) (cited at Pet. 19), the Sixth Circuit did resolve a collateral state law challenge to a FERC certificate that arose outside of the separate Section 19(b) review proceeding before another federal court of appeals. See 887 F.2d at 1298-1299. But in *Michigan Consolidated*, the FERC certificate holder first initiated federal proceedings to thwart any potential state law interference; the collateral challenge was then filed in response. See *id.* at 1298. Here, by contrast, petitioner filed its collateral state law challenge in state court in anticipation of Williams' receipt and use of the FERC certificate, and then proceeded to litigate the validity of that certificate in separate state and federal forums.

Court in *City of Tacoma* nor the court below suggested that state courts are deprived of all jurisdiction to consider any claim against a certificate holder relating to the authorized service. Rather, the problem in each case is to determine whether, in the circumstances presented, the true core of the state court action constitutes a challenge to the authority granted by the certificate. Here, as in *City of Tacoma*, it clearly did.

Thus, this case is distinguishable from *Central New England Ry.* v. *Boston & A.R.R.*, 279 U.S. 415 (1929). See Pet. 16. In *Central New England*, this Court held that a state law action in breach of contract for railroad service, after the railroad had received the Interstate Commerce Commission's approval for abandonment, was not "one to 'enjoin, set aside, annul or suspend' an order of the Commission of which the federal district courts are given exclusive jurisdiction." *Id.* at 420. As the Court explained:

> [R]espondent does not ask that the order be set aside or that it be regarded as illegal and void; it insists only that the order did not purport to deal with the contract between the carriers, and so cannot have the effect * * * of annulling the contract. The question is merely one of the legal effect of the order. Neither party contests its validity or asks that the carrier be compelled to do anything inconsistent with its terms.

Id. at 421.

Here, by contrast, petitioner's state law action sought to enjoin Williams from complying with the express terms of the FERC certificate, *i.e.*, to operate the pipeline. In other words, petitioner's state law action sought to accomplish precisely what this Court identified in *Central New England* as an impermissible collateral attack, namely, compelling the federal licensee to do something "inconsistent with the [terms]" of the federal agency order. 279 U.S. at 420; see, *e.g.*, *Lambert Run Coal Co.* v. *Baltimore & Ohio R.R.*, 258 U.S. 377, 381-382 (1922)

(suit to enjoin railroad from following ICC rules is the equivalent of a suit to stay an ICC order and thus must comply with exclusive statutory review provisions).[14]

d. Finally, petitioner mistakenly claims (Pet. 19-20) that the court of appeals' decision departs from the Commission's position advanced below. In the context of urging the court of appeals to overturn the state court injunction, the Commission did express its views on the merits of the preemption issue. As the Commission stated:

> [T]he state court injunction * * * constitutes an impermissible intrusion into the Commission's exclusive jurisdiction over the transportation of natural gas in interstate commerce under section 1(b) of the Natural Gas Act * * *, and, unless overturned, will unlawfully render unenforceable the Commission's orders exercising that jurisdiction.

Joint Br. in Opp. App. 40a.[15] But the Commission also argued that the state court injunction should be set aside because petitioner had "evade[d] [the] proper resolution of its concerns by an end run [around the Section 19(b)

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[14] For similar reasons, petitioner mistakenly relies (Pet. 17-18; Reply Br. 3 n.2) on *Pan American Petroleum Corp.* v. *Superior Court*, 366 U.S. 656 (1961). In that case, this Court held that the NGA did not preclude the state court from adjudicating "traditional common-law [contract] claims" involving the purchase of natural gas where "[n]o right is asserted under the Natural Gas Act." *Id.* at 663. And the Court made clear that the lawsuit did not involve any issue with respect to "the extent to which the Natural Gas Act reinforces or abrogates the private contract rights * * * in controversy." *Id.* at 664. Here, by contrast, petitioner's state court action plainly sought to prevent Williams from exercising its rights under the FERC certificate and thus, by its terms, sought to invalidate or modify that certificate issued exclusively under the NGA.

[15] Indeed, on petitioner's request for rehearing, the Commission had responded to the state court's injunctive order by stating categorically that "the state court's determination is erroneous. * * * [T]he Commission has exclusive jurisdiction over [Williams'] proposal." Pet. App. 65a n.5.

review proceeding] to an inappropriate state forum." *Id.* at 46a. The Commission made plain that petitioner's substantive

> argument is properly made in the U.S. Court of Appeals on a challenge to the Commission's orders as arbitrary, capricious, or otherwise constituting an abuse of discretion. * * * [Petitioner] has appealed the Commission's orders to the D.C. Circuit, and that court will, therefore, have occasion to adjudicate this policy question. The instant proceeding initiated in state court, however, instead invokes state jurisdictional authority which * * * has no basis in law.

Id. at 47a. The court of appeals' disposition of petitioner's collateral challenge was therefore consistent with the views espoused by the Commission.

2. In a brief and somewhat cryptic discussion (Pet. 22-27), petitioner attacks the court of appeals' decision on the grounds that the direction to the district court to enjoin enforcement of the state court decree conflicts with 28 U.S.C. 1738, with 28 U.S.C. 2283 (the Anti-Injunction Act), and with related doctrines. Although the court of appeals' largely unexplained ruling on this point does raise questions under these various statutes and doctrines, we believe that the decision below is consistent with governing law and that, in view of the unusual context of this case, that aspect of the court of appeals' judgment does not warrant further review.

a. Petitioner contends that the court of appeals' order violated 28 U.S.C. 1738, which requires federal courts to give state court judgments the same full faith and credit that state courts would give them. See *Marrese* v. *American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985). But since the error in the state court's exercise of authority went to subject matter jurisdiction, it is far from clear that collateral attack would be precluded under state law. See Restatement (Second) of Judgments § 12 (1982). Moreover, a federal court is not required to give preclusive effect to a prior state court judgment where, as here, the state court judgment encroaches on exclusive

federal jurisdiction and does so in a manner inconsistent with a comprehensive statutory scheme designed by Congress to govern the subject matter at issue. See, *e.g.*, *Brown* v. *Felsen*, 442 U.S. 127, 134-139 (1979); *Kalb* v. *Feuerstein*, 308 U.S. 433, 438-444 (1940); see also Restatement (Second) of Judgments § 86 comment b (1982).[16]

b. Petitioner also raises the Anti-Injunction Act, 28 U.S.C. 2283, as an obstacle to the court of appeals' order. That Act provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

"Prevention of frequent federal court intervention," this Court has recognized, "forestalls 'the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court.'" *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 146 (1988) (quoting *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 630-631 (1977) (plurality opinion)). Nevertheless, the express statutory exceptions to this principle "ensure the effectiveness and supremacy of federal law." *Chick Kam Choo*, 486 U.S. at 146.

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[16] Nor is the court of appeals' decision in conflict with the doctrine of *Rooker* v. *Fidelity Trust Co.*, 263 U.S. 413 (1923), and *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983). In those cases, the Court held that lower federal courts lack appellate jurisdiction to review state court determinations. The present federal suit, however, was not an action to obtain appellate review of a state court judgment. Rather, Williams filed its federal action to enforce its rights under the FERC certificate, as expressly provided in Section 7(h) of the NGA. In that context, the *Rooker-Feldman* doctrine does not preclude a collateral challenge to a state court judgment where that challenge is otherwise permissible. See the discussion in 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4469, at 663-666 (1981).

Because the court of appeals issued its order without referring to the Anti-Injunction Act, the basis for its decision is not clear. But in our view, the order was warranted under Section 2283 because it was "necessary in aid of [the district court's] jurisdiction" over Williams' condemnation action under Section 7(h) of the NGA. The district court exercised jurisdiction to enforce Williams' right, as provided by the FERC certificate and Section 7(h), to condemn rights-of-way to use Oklahoma City's streets to build and operate the Commission-approved pipeline. The state court judgment interfered with the purpose of that condemnation—to operate the pipeline.[17] Thus, the injunction appears warranted in order to ensure full adjudication of Williams' Section 7(h) condemnation action.[18]

Moreover, the court of appeals, in remanding for issuance of an injunction, may be seen as acting on behalf of the D.C. Circuit, the court exercising exclusive jurisdic-

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[17] We note that the condemnation action had the attributes of an action in rem, and that "[m]ost courts have viewed the 'necessary in aid of jurisdiction' language [in Section 2283] as confirming the 'res' exception previously recognized in the federal courts." See P. Bator, D. Meltzer, P. Mishkin, & D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 1327 (3d ed. 1988) [*Hart & Wechsler*].

[18] As petitioner points out (Reply Br. 5), the district court and Williams appear to have drawn a distinction between the cause of action under Section 7(h) for condemnation of property rights and Williams' claim that it is entitled to use the pipeline regardless of the state law franchise requirement. That distinction, however, appears to be unwarranted. Under Section 7(h), the district court has the express authority to grant Williams, as the FERC certificate holder, "the necessary right-of-way to construct, *operate*, and maintain a pipe line or pipe lines for the transportation of natural gas * * *." 15 U.S.C. 717f(h) (emphasis added).

Indeed, in the context of this statutorily authorized condemnation proceeding, the other exceptions to Section 2283—for "expressly authorized" injunctions and for injunctions "to protect or effectuate [the court's] judgments"—may also be relevant to the analysis. See generally *Hart & Wechsler*, *supra*, at 1324-1326, 1327-1328.

tion to review the merits of petitioner's challenge to Williams' FERC certificate. The D.C. Circuit, having exclusive jurisdiction under Section 19(b) to review the FERC certificate proceeding, would, in our view, have had authority in aid of that jurisdiction to enjoin the state court judgment. See *Capital Service, Inc.* v. *NLRB*, 347 U.S. 501 (1954). And the Tenth Circuit could have exercised that same authority had petitioner chosen to file its Section 19(b) petition in that court, which would have been a proper forum as the circuit "wherein the natural-gas company to which the order relates is located or has its principal place of business." 15 U.S.C. 717r(b).

c. Finally, and almost in passing (Pet. 24, 27), petitioner raises the question whether the court of appeals' order is consistent with the abstention doctrine articulated in *Younger* v. *Harris*, 401 U.S. 37 (1971), and later cases. The issue, once again, was not addressed by the court of appeals, but in our view, application of the *Younger* doctrine to this case would involve a substantial, and unwarranted, extension of existing law.

In general, the *Younger* doctrine has been applied to cases in which the state interest being protected is the interest in pursuing a state-initiated criminal (or, in some circumstances, civil) prosecution in a state forum. See *Huffman* v. *Pursue, Ltd.*, 420 U.S. 592, 603-605 (1975). In a few instances, the court has applied that doctrine in the context of private state court litigation when the issue involves a question critical to the state's system of administering justice in its courts. See, *e.g.*, *Juidice* v. *Vail*, 430 U.S. 327 (1977) (challenge to state contempt process); *Pennzoil Co.* v. *Texaco Inc.*, 481 U.S. 1 (1987) (challenge to state system for enforcing judgments). No such question is presented here. To the contrary, the question in this case involves a state's authority, in private litigation, to intrude into an area of paramount federal concern.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

OKLAHOMA NATURAL GAS COMPANY,
Petitioner,
v.
WILLIAMS NATURAL GAS COMPANY,
SMITH COGENERATION INC.,
POWERSMITH COGENERATION PROJECT
LIMITED PARTNERSHIP, and CITY OF OKLAHOMA CITY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONSE OF PETITIONER TO THE SOLICITOR GENERAL'S AMICUS BRIEF

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RESPONSE OF PETITIONER TO THE SOLICITOR GENERAL'S AMICUS BRIEF

The government, recommending against a grant of certiorari, argues that the Tenth Circuit correctly construed Section 19(b) of the Natural Gas Act to oust the state court of jurisdiction over petitioner's state law claim, so that petitioner was required, after all, to present its claim to FERC. SG Brief 9-16. The government also argues that the injunction against the state court order was, if not proper, at least "consistent with governing legal principles." SG Brief 10. The government's explanation of both points, however, merely confirms the importance of this Court's review, for the government not only proposes a quite new restriction on state court jurisdiction but fails to offer a workable standard that courts and litigants can apply to determine what forum may or may not hear particular state law claims.

1. a. We suggested in our petition that review by this Court is needed to establish a clear rule telling parties who have state law claims against holders of FERC certificates in what circumstances they must depart from the usual practice of filing such claims in state court and instead present such claims to FERC. The government, like the Tenth Circuit, rejects the clear rule supported by the statute and precedent—that state court is a proper forum for *any* state law claim, like petitioner's, that does not in fact challenge the validity of a FERC certificate. *See* Pet. 14-20. The government instead argues that a line must be drawn between different types of state law claims. It concedes that *some* state law claims against certificate holders may be brought in state court (*see* SG Brief 13-14) [1] but says, at the same time, that *other* state-law claims can be brought only before FERC. What is the difference between one type of claim and the other? According to the government, the claims to be presented to FERC are those which are regarded as the "functional equivalent" (SG Brief 10) of claims that a FERC certificate should be "set aside" or "modified" (Section 19(b))—even though, by their terms, the claims do *not* seek to modify or set aside a FERC certificate but rather to subject the certificate holder to an additional requirement under state law. With all due respect, this approach provides no line that is defensible or that gives clear guidance on the first question any litigant must answer—where to bring a claim.

As it turns out, the government itself seems to have only the vaguest idea about how to apply its new-found standard to actual claims. Its first attempt at explaining why petitioner should have brought its state law claim before FERC is simply that petitioner "sought to subject Williams' use of the FERC-approved pipeline to the state law franchise requirement and thus necessarily to prevent

[1] "Neither this Court in *City of Tacoma* nor the court below suggested that state courts are deprived of all jurisdiction to consider any claim against a certificate holder relating to authorized service." SG Brief 13-14.

Williams from operating the pipeline under the express terms of the FERC certificate. Indeed, petitioner's state law action sought to enjoin implementation of the FERC certificate by subjecting Willams' proposed pipeline to an additional state law requirement." SG Brief 10. But if that explanation defines the test, *any* attempt to prevent a certificate holder from disregarding state law is the "functional equivalent" of a petition to set aside the certificate. That standard would apply to every enforceable state law. The government offers no support for such a sweeping new rule of exclusive FERC jurisdiction, and the case law is to the contrary, recognizing that state law claims of precisely this type are properly litigated outside the Section 19(b) context. *See, e.g., Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988); *Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1806 (1990); *Michigan Consol. Gas Co. v. FERC*, 883 F.2d 117, 122 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1807 (1990). Even Williams, in acknowledging that state environmental and safety laws apply to the certificated project (Pet. App. 89a), concedes that a claim that a certificate holder may not proceed without complying with certain state laws is not an effort to "set aside" or "modify" a certificate within the meaning of Section 19(b).

Elsewhere in its brief, the government refines its approach: it proposes a narrower, case-specific inquiry into the nature of the particular state law claim, requiring litigants "to determine whether, in the circumstances presented, the true core of the state court action constitutes a challenge to the authority granted by the certificate." SG Brief at 14. But the government then offers no guidance on how to determine whether the "true core" of a particular state law claim challenges a FERC certificate even though the claim does not purport to do so. What the government seems to have in mind is some sort of inquiry into how directly or substantially application of a particular state law would affect a certificated proj-

ect. Such a sliding-scale/balancing approach not only does little to tell litigants what they need most to know—what forums properly may hear a claim and what forums are barred from doing so[2]—but also mixes up the question of jurisdiction with the separate inquiry into whether a particular state law is preempted.[3] This Court in *Pan American Petroleum Corp. v. Superior Court of Delaware*, 366 U.S. 565 (1961), rejected just such an effort to transform a Natural Gas Act preemption defense to a state law claim—whatever the ultimate merits of that defense—into a Section 19(b) jurisdictional bar on state court adjudication of the claim.[4]

b. The government's only support for its amorphous standard is *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958). But as the government acknowledges (SG Brief 11), *Tacoma* involved an attempt to relitigate a claim in state court that, unlike petitioner's state law claim here, had actually been litigated in a prior proceeding; and the Court in *Tacoma* relied centrally on that fact. 357 U.S. at 334-39. The government suggests (SG Brief 12) that *Tacoma* went on to hold that state court

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[2] This Court has observed that "litigants ought to be able to apply a clear test to determine" whether they have brought their cases to the right court. *Heckler v. Edwards*, 465 U.S. 870, 877 (1984); *see also Budinich v. Becton Dickinson & Co.*, 108 S. Ct. 1717, 1722 (1988) (rule with jurisdictional consequences "should above all be clear").

[3] *See Northwest Central Pipeline Corp. v. Corporation Comm'n of Kansas*, 109 S. Ct. 1262 (1989) (Natural Gas Act preemption inquiry examines directness and substantiality of impact of state measure on FERC orders); *English v. General Electric Co.*, 58 U.S.L.W. 4679, 4683 (U.S. June 4, 1990) (same outside NGA context).

[4] In *Pan American*, the defendant specifically argued that a state law contract claim was in reality a claim to modify a filed rate and that, under Section 19(b), the claim therefore could not properly be brought in state court. This Court held that, whatever the merits of the preemption defense that the state law claim conflicted with a filed rate, the state court had jurisdiction over the claim because it was stated as a claim under state law and could not be judicially rewritten to be something else.

litigation of certain state law issues was barred because those issues "could and should have been" presented to the Commission (and therefore to the Section 19(b) reviewing court), whether or not they actually were so presented. 357 U.S. at 339. That suggestion simply misreads *Tacoma*. The passage quoted by the government says only that the issues in question could and should have been raised before the *court of appeals* (not the *Commission*) in the Section 19(b) proceeding (*ibid.*)—a proposition that is hardly surprising given that, as the Court had just demonstrated at great length (357 U.S. at 334-39), the issues had in fact been raised before and decided by the Commission. But contrary to the Tenth Circuit's and the government's view, *Tacoma* does *not* say that any particular state law issues must be raised before the *Commission* and not in state court.

In any event, even if *Tacoma* does require the presentation of certain state law issues to FERC, it offers no real guidance on how to distinguish state law claims that can be brought only to FERC from state law claims that may be litigated in the usual manner, *i.e.*, in state court. The government quotes (SG Brief 12) only *Tacoma*'s singularly unenlightening reference to "all issues inhering in the controversy" (357 U.S. at 336), but the government does not explain what that standard means or its relationship to the government's "true core"/"functional equivalent" standard.[5] Certainly, this Court's full con-

[5] On the assumption that *Tacoma*'s "inhering in the controversy" standard does apply to some state law issues that are not actually presented to the Commission, the standard might be understood as dependent on the command of Section 9 of the Federal Power Act that a license applicant actually place before the Commission various state law issues. That may be so even though, as the government notes (SG Brief 14-15), the Commission is not obliged to insist on compliance with any particular state laws. Contrary to the government's suggestion (SG Brief 15), the *Tacoma* Court did rely on Section 9: in crucial passages of the opinion describing what issues were before the Commission, the Court pointedly cited to Section 9. 357 U.S. at 326 n.9, 337 n.17. The government does not rely on any controversy-defining provision of the Natural Gas Act that is comparable to Section 9 of the Federal Power Act.

sideration is required before *Tacoma*'s vague language can be allowed to become the basis for a new standard funneling some class of state law issues to FERC.

c. The government's brief does no better at explaining away the intercircuit conflict, and its own prior inconsistent position, than it does at proposing a standard that sweeps some state law claims under the language of Section 19(b). The government simply ignores the D.C. Circuit's express ruling in *Michigan Consol. Gas Co. v. FERC, supra,* that the Section 19(b) proceeding there did *not* encompass a claim—identical to petitioner's claim, for present purposes—that a FERC certificate holder may not proceed with its project (as here, a local bypass) without also complying with state law. 883 F.2d at 122. The government at least tries to distinguish the Sixth Circuit's decision in *Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co., supra*—where the Sixth Circuit decided the claim that the D.C. Circuit had not decided—by observing that the party seeking to enforce state law against the certificate holder in that case had filed suit in state court (one day) *after* the certificate holder itself filed a declaratory judgment action raising the same issues in federal district court. SG Brief 13 n.13. But the government merely points out the distinction, without explaining (or indeed asserting) its relevance under Section 19(b). In fact, the timing of the state law claims against the certificate holder has no bearing on the scope of Section 19(b), which, in the Tenth Circuit's and government's view, should have made the jurisdiction of the D.C. Circuit exclusive and barred the Sixth Circuit from exercising jurisdiction over those claims. Yet the Sixth Circuit took jurisdiction over and decided the preemption defense to the state law claims on the merits.

The government's current view of the scope of Section 19(b) is also flatly inconsistent with the view it took in the D.C. Circuit and Sixth Circuit cases. In the D.C. Circuit case, FERC told the court that it should *not* decide whether the certificate holder must also comply with

state law, explicitly distinguishing that question from the question of FERC's jurisdiction to issue the certificate. Instead, both in the D.C. Circuit and in the Sixth Circuit, FERC specifically urged that the Sixth Circuit case, on appeal from actions filed in district court and in state court (outside Section 19(b), of course), was the proper forum for decision of the state law issue.[6] Not until its current amicus brief—neither in FERC's brief in the Tenth Circuit nor previously, to our knowledge—has the government taken the position that Section 19(b) covers not only challenges to the *validity* of a FERC certificate but also state law claims that may raise issues (in defense) as to the preemptive *effect* of a FERC certificate.

2. The government does not assert that the Tenth Circuit acted properly in requiring an injunction of the state court judgment. It goes no farther than to argue that the "largely unexplained ruling on this point" was "consistent with governing law." SG Brief 16. Even that defense of the decision below, however, is at best half-hearted and noncommittal, and it does little more than underscore that new law would have to be made if the injunction is to be upheld under an exception to the general rule that challenges to state court decisions must proceed through state appellate courts, not through collateral attacks in the federal trial and appellate courts. *See, e.g., Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988); *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525 (1986).

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[6] FERC told the D.C. Circuit: "Although the Commission orders and petitioners addressed both the questions of Commission jurisdiction and the preemptive effect of such jurisdiction on Michigan's authority, we maintain that the preemption issue is more fully presented in No. 88-1650 (6th Cir.). Consequently, in response to inquiries by the U.S. Court of Appeals for the Sixth Circuit, we have informed that court that the preemption issue should be decided in No. 88-1650, where it has been briefed and argued. If that court decides not to reach the issue, we believe this Court should rule on the merits of [the] issue." Brief for FERC in No. 88-1062 (D.C. Cir.) at 17 n.8.

a. In defense of the Tenth Circuit's refusal to give full faith and credit to the state court's decision upholding its own jurisdiction, the government begins by apparently conceding that, under 28 U.S.C. § 1738, Oklahoma law governs the preclusive effect of the decision. But the government does not go on to argue that Oklahoma courts would decline to give preclusive effect to the decision. It says simply, and without citation to any Oklahoma cases, that "it is far from clear" that Oklahoma courts would do so. SG Brief 16. We know of no support for the surprising view that the Oklahoma courts would permit collateral relitigation of a jurisdictional question previously litigated and decided in the state courts (where there are full rights of appeal).[7]

As a secondary defense of the non-preclusion ruling, the government asserts, again without any elaboration, that issue preclusion with regard to the state court's resolution of the jurisdictional question is inapplicable because the state court judgment encroaches on exclusive federal jurisdiction under a comprehensive statutory scheme. SG Brief 16-17. But the only decisions cited by the government—*Brown v. Felsen*, 442 U.S. 127, 134-39 (1979); *Kalb v. Feuerstein*, 308 U.S. 433 (1940), both of which involved the bankruptcy scheme—are plainly inadequate support for the Tenth Circuit's refusal to give preclusive effect to the state court's decision on the issue of its own jurisdiction.[8] *Brown*, while declining to apply

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[7] Of course, it has long been the ordinary rule even under the Full Faith and Credit Clause of the Constitution that actual litigation of a court's jurisdiction precludes a later collateral attack seeking to relitigate the jurisdictional question. *See, e.g., Johnson v. Muelberger*, 340 U.S. 581 (1951); *Sherrer v. Sherrer*, 334 U.S. 343 (1948). That is likewise the ordinary rule under the Restatement (Second) of Judgments § 12 Comment c.

[8] That is so even if one puts aside questions about the meaning of those decisions in light of this Court's recent decisions applying state preclusion principles under 28 U.S.C. § 1738 in the face of claims within exclusive federal jurisdiction. *See Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373 (1985).

claim preclusion to a state court judgment, specifically noted that *issue* preclusion was different and that (at least as to factual issues) a state court's actual decision of an issue *would* preclude its relitigation in federal court even in the face of an exclusive federal jurisdictional scheme. 442 U.S. at 139 n.10. Similarly, as this Court has specifically noted, *Kalb* did not approve a federal court's refusal to apply *issue* preclusion on a jurisdictional question, because the case did not involve a prior state court resolution of the question of its own jurisdiction. *See Durfee v. Duke*, 375 U.S. 106 (1963). Unsurprisingly, leading commentators have expressly noted that even in the *Kalb* situation, where "federal law has preempted all state jurisdiction to render any judgment whatever . . . [,] litigation of the jurisdiction question in the state courts may preclude reexamination in a federal court." [9] Accordingly, new law would be required in order to justify the Tenth Circuit's second-guessing of the state court's decision on the jurisdictional question.

b. In defense of the Tenth Circuit's refusal to follow the Anti-Injunction Act's general ban on federal court injunctions against state court orders, the government's primary contention is that the injunction "appears warranted" (SG Brief 18) under the exception allowing a federal court to issue an injunction where "necessary in aid of its jurisdiction" (28 U.S.C. § 2283). The government's only argument is that the state court judgment "interfered with the purpose of [the] condemnation—to operate the pipeline." SG Brief 18. But that theory would render the Anti-Injunction Act a nullity, because it would apply to any situation in which a state court proceeding might interfere with the purpose of *any* federal court proceeding—to vindicate certain legal rights. The government fails to offer any explanation of what

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[9] 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4470, at 675 (1981) (footnotes omitted) (citing *Alleghany Corp. v. Kirby*, 340 F.2d 311, 312 n.1 (2d Cir. 1965), *cert dismissed*, 384 U.S. 28 (1966)).

distinguishes the condemnation proceeding—or of why an injunction against a state court judgment on collateral rights under a state franchise law is necessary to protect the federal court's jurisdiction to grant certain property rights to Williams.[10]

In another attempt to find a basis for the injunction, the government also states that the Tenth Circuit "may be seen as acting on behalf of the D.C. Circuit" in requiring the injunction. SG Brief 18. But the Anti-Injunction Act allows a federal court to issue an injunction only in "aid of *its* jurisdiction" (emphasis added). That language, which the government simply ignores, cannot support the injunction in this case. The Tenth Circuit is not the D.C. Circuit (*see* 28 U.S.C. § 43); and neither is the District Court for the Western District of Oklahoma, which is the court, after all, that has been directed to issue the injunction (Pet. App. 18a).

c. Finally, in defense of the Tenth Circuit's refusal to apply the abstention doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), the government merely points out that the applicability of the doctrine in the present circumstances has not been settled by this Court. SG Brief 19. The government observes that most *Younger* cases involve other than purely private litigation, but then it acknowledges that the doctrine has been applied to suits between private parties as well. SG Brief 19. It is by no means clear why the state courts' interests in enforcement of their judgments and in their normal processes for appeal of disputed rulings, and the federalism policy commanding respect for those state interests, do not fully justify application of *Younger* abstention in the present case. In any event, what standards govern abstention in circumstances like the present is obviously an open and important question (*see* Pet. 27), which the Tenth Circuit ignored.

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[10] The government "note[s] that the condemnation action had the attributes of an action in rem" (SG Brief 18 n.17), but again it offers no elaboration of the relevance of that fact. Of course, the Tenth Circuit's decision does not rely on any such rationale.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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